ANNUAL REPORT

1978

Massachusetts Labor Relations Commission

THE COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION
1604 LEVERETT SALTONSTALL BUILDING
100 CAMBRIDGE STREET, BOSTON 02202

Michael S. Dukakis
Governor

James S. Cooper
Chairman
Garry J. Wooters
Commissioner
Joan G. Dolan
Commissioner

Ann DaDalt
Executive Secretary

TO:

The Honorable Paul Guzzi
Secretary of the Commonwealth
Boston, Massachusetts

Sir:

We are pleased to submit to you the report of the Massachusetts Labor Relations Commission for fiscal year ending June 30, 1978, in compliance with the provisions of Section 32 of Chapter 30 of the General Laws, and Section 9-0(c) of Chapter 23 of the General Laws, as amended.

LABOR RELATIONS COMMISSION

JAMES S. COOPER, CHAIRMAN

GARRY J. WOOTERS, COMMISSIONER

JOAN G. DOLAN, COMMISSIONER

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APPROVED by Alfred C. Holland, State Purchasing Agent

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I. THE PURPOSE OF THE ANNUAL REPORT

The Labor Relations Commission (the Commission) administers the Public Employee Bargaining Law, Chapter 150E, and the "Baby Wagner Act," Chapter 150A of the General Laws. These laws give employees of state and local government, and employees of private businesses which conduct only intra-state transactions, the right to organize and bargain collectively with their employers.

The Commission conducts elections for collective bargaining representatives, and certifies the results; holds hearings and issues decisions on unfair, or prohibited, labor practice charges; investigates strikes; and considers requests for binding arbitration.

Although the Commission has been in existence since 1937 to administer Chapter 150A, its jurisdiction was greatly expanded in 1964, 1975, and 1973, when the legislature granted collective bargaining rights to municipal, county and state employees respectively. (See Table 1: "How Did Public Employees Bargaining Evolve?")

The purpose of this report is: to explain how the Commission functions; to report important decisions issued this year; and to provide information concerning the agency's workload and productivity.

II. MAJOR ACCOMPLISHMENTS OF THE YEAR

1. Decisions and Orders

A list of the Commission's major Decisions and Orders of the past year appear in Appendix A.

2. New Representation Petition Procedures

New procedures for handling representation petitions have reduced the time from the day a petition is filed, to the day an election is held by one half.

3. Major Elections

Appendix B contains a list of the Commission's major elections in the past fiscal year.

4. Increased Productivity

The number of Decisions issued this year has increased 25 percent. This indicates that the productivity of the Commission has increased, and that cases are being disposed of more rapidly.

III. STRUCTURE OF THE COMMISSION

The Commission is composed of three members, appointed by the Governor, who serve five year terms. One commissioner is designated to act as Chairman. The Commission has the authority to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of the law.

The Executive Secretary supervises employees under the direction of the Commission; prepares agendas for executive session; keeps the Commission informed of all matters pending; and maintains a permanent record of the disposition of any matter discussed and/or voted upon at the executive session. There is also an assistant executive secretary.

A staff of attorneys acts as agents of the Commission to: prosecute any inquiry necessary to the performance of its functions; appear for and represent the Commission in any case in court; and to conduct hearings.

Labor Relations Examiners also act as Commission agents to conduct investigations and elections.

The head clerk attends to bookkeeping and administrative matters. Stenographers report formal hearings. Secretaries type decisions, prepare election material, send out notices and perform other clerical and administrative tasks. (See Table 2.)

1. Commissioners and Executive Secretary

James S. Cooper has served as Chairman since October 1975. Previously he was an attorney for the Boston law firm of Holtz and Drachman, the Massachusetts Commission Against Discrimination, and the New Jersey Division of Civil Rights. He is a graduate of Rutgers University Law School, where he served as a clinical instructor the year following his graduation.

Garry J. Wooters was appointed to the Commission in November 1976, to replace Henry C. Alarie, who retired. Commissioner Wooters has previously served as counsel to the Commission, as a field attorney for the National Labor Relations Board, and as counsel to the National Association of Government Employees. He is a graduate of Boston University Law School.

Joan G. Dolan was appointed as a Commissioner on July 18, 1977. She replaced Madeline H. Miceli, who retired in January. Dolan was previously an attorney for the Massachusetts Teachers Association, and is a graduate of Northeastern University Law School.

Ann Da Dalt assumed her duties as Executive Secretary when Alfonzo D'Apuzzo retired. She had previously served as assistant executive secretary.

2. The Staff

Rita Alberti, secretary, has returned to the Commission, where she previously worked for over 20 years, after a year at the Department of Elder Affairs...Bill Blanning, public information officer, joined the Commission in February. He graduated from Yale in 1976 and does freelance writing...Cathy Burke, secretary, is a graduate of Chandler School for Women and joined the Commission in June...Frederick V. "Fritz" Casselman, is a graduate of Boston University Law School, Patty A. Ciampa, is the Commission's bookkeeper. She is a graduate of Julie Billiart High School in Boston and Burdett College...Shirley DeMarco is the Commission's election specialist and graduated from Fitten Central High School in East Boston...Diane Drapeau joined the Commission last September and is a graduate of Suffolk University Law School...Jean Driscoll is a graduate of Boston College Law School and joined the Commission last September...Philip J. Dunn came to the Commission in September 1976 from Gregory, Von Lopik, and Higle, a labor law firm in Michigan, and is a graduate of Northeastern University Law School...Sharon Henderson Ellis, a graduate of Suffolk University Law School, joined the Commission September 1976. Prior to law school, she served in the Peace Corps in Tunisia...David F. Grunebaum came to the Commission September 1976 after receiving a Masters in Labor Law from New York University. He was previously in private law practice in Boston, and served as a Vista volunteer. He is a graduate of Boston University Law School...Alice T. Hintsa, hearing stenographer, first came to the Commission in 1956. She took time off in between, however, to teach evenings at the Stenotype Institute and to do some freelance reporting...Stuart A. Kaufman came to the Commission in March 1976, after serving as legal counsel to the legislature's Committee on Public Service. He is a graduate of Boston College Law School, and directs a community band in Brookline...James M. Litton is a graduate of New York University Law School. He was counsel to the International Ladies Garment Workers Union in New York before coming to the Commission in June 1976...Priscilla Lyons is the assistant to the executive secretary and a graduate of Boston College Law School...Ralph Lyons, hearing stenographer, came to the Commission seven years ago after a 14 year career in the railroad industry. He now teaches two nights a week at Touch Shorthand Academy, and has a black belt in judo...Robert B. McCormack, a graduate of Boston University Law School, has been at the Commission since 1972. Prior to that, he was defense counsel for the AMICA Insurance Company, and was in private practice in Hingham...John L. McLaughlin, labor relations examiner, has been with the Commission 12 years. A graduate of Boston College, he was previously with the National Labor Relations Board...Norener Reid, hearing stenographer, is a graduate of Boston Business School and Touch Shorthand Academy...Dale Smith, is a graduate of Northwest High School in St. Louis, Missouri and joined the Commission last November. Ourania "Nea" Trypousis, secretary, is a student at Suffolk University, majoring in business education. She works part-time at the Commission between her studies...Arthur S. Weber, head clerk, is a retired

senior examiner with the Postal Inspection Service. He has worked for the Town of Braintree, the First National Bank, and the State Police since his retirement...Judith A. Wong is a graduate of Boston University Law School and joined the Commission last October. She had previously worked at the Massachusetts Commission Against Discrimination. She also holds the esteemed position of office softball coach...Jackie Young, is a candidate for a Ph.D. degree in labor relations from Rutgers University and joined the Commission last May. She previously worked as an organizer for several unions and has taught labor relations at the university level...Janice Zimmermann, secretary, is a graduate of Medford High School and joined the Commission last January. She is expecting her first child in October.

IV. CASELOAD AND PRODUCTIVITY

The following is a detailed description of how the Commission performs its four basic functions.

1. Representation Cases

When employees or a union file a petition requesting the Commission to conduct an election for a collective bargaining representative, the Commission must determine the appropriate bargaining unit. This requires a finding as to which employees share a "community of interest" at the bargaining table. Sometimes the employer and the union consent to an appropriate unit, and the Commission approves it. But if they cannot agree, or if they propose an inappropriate unit, the Commission conducts hearings to make a determination. After the unit is defined, the Commission conducts a secret ballot election, and certifies the results. (See chart 3.) A special subset of representation petitions is "clarification petitions," filed by the employee organization or the employer for the purpose of clarifying or amending a recognized or certified bargaining unit.

2. Unfair Labor Practices

There are employment practices prohibited under Chapter 150E § 10(a) and (b), Chapter 150A § 4(a) and (b), which the employer and the employee organization are prohibited from performing. If the employer, or employee organization believes that an employee, employer or employee organization has performed a prohibited practice, they can file an unfair labor practice charge (prohibited practice charge) with the Commission (Chart 4, Step A). The Commission conducts an informal conference when such a charge is filed, (step B), at which a Commission agent obtains statements from both parties and attempts to bring about a settlement (step C). The agent reports the results of the conference to the Commission (step D). If a settlement is not reached and the Commission finds that there is sufficient evidence to the charge to

warrant a hearing, a complaint is issued (step E), and a formal (step F) or expedited (step G) hearing is held. A hearing officer or Commissioner presides at the hearings. During the hearings, witnesses are called and evidence is introduced. After an expedited hearing, the hearing officer issues a decision (step H), which is appealable to the full Commission (step I). Subsequent to a formal hearing, the Commission issues a decision (step J), which is appealable only to the courts (step K).

3. Strikes

Under Chapter 150E, public employees are prohibited from striking. Thus, when employees engage in or threaten to engage in a strike, the employer may petition the Commission to investigate. The Commission requires that representatives of the employer and employee organization appear for a formal investigation. The Commission "sets requirements that must be complied with." Such an investigation is given highest priority at the Commission.

4. Request for Binding Arbitration

If an employer and an employee organization enter a written contract which does not provide a grievance clause culminating in final and binding arbitration, to be invoked in the event of any dispute concerning the interpretation or application of such written agreement, the Commission may order such arbitration upon the request of either party.

A. Caseload

Between 1966 and 1973, the Commission's caseload grew over 300 percent; since the passage of Chapter 150E in 1973, when state employees were granted collective bargaining rights, the caseload has grown an additional 20 percent.

Table 1 indicates these increases. Table 2 shows the total filings of different types of cases during the past fiscal year. The Commission's case code is explained in the table. Table 3 indicates the number of elections which the Commission conducted this past year. This number does not reflect the size of the elections, some of which require the attendance of a majority of the staff. Table 3 also indicates the total number of Hearing Officer and Commission Decisions issued. Table 4 shows the number of hearings held with a breakdown of the types of hearings; formal, expedited, informal conferences, and other. (Other includes strike investigations, hearings on challenged ballots, objections to an election, etc.). Table 5 details the number of strike investigations, the number of actual work stoppages, and the Commission's role in settling the disputes.

The following testimony presented by Chairman Cooper before the Public Service Committee of the General Court, explains the

Commission's role during strike investigations:

> "The Commission's focus on strikes has been to get the underlying dispute settled as quickly as possible. We do not view our role as being merely a club to be used by employers to get their employees back to work. We will always order employees back to their jobs; but, we will also look further into the causes of the strike and attempt to get the parties back together and resolve the problem... Of the 47 strike petitions, we have settled either at our offices or after an Order, 31 cases. This represents approximately 65 percent of all the petitions filed. We are proud of this work."

> "We regard our role in the Superior Court to be somewhat different than acting as the agent of the employer. The Commission appears before the Court seeking enforcement of its Order. We attempt to guide the Court in deciding what action should be taken. We do not 'represent' the employer, we represent the Commission in serving in the public interest. Thus we define our role as being an aid to the Court in bringing an end to the dispute. We seek to represent a neutral position before the Court, but we always seek to have the Court enjoin the work stoppage."

B. Productivity

The best way to illustrate each attorney's workload is to multiply the number of hours spent on an average case, 50 (table 8), by the total number of cases which reached decisions, 152. (152 x 50 = 7,600 person hours) 7,600 person hours is over 50% of available attorney ime (8 attorneys x 35 hours per week x 50 weeks = 14,000). Immeasurable amounts of time are also spent in disposing of additional cases by dismissal, settlement or some other means; on court cases; officer of the day work; executive sessions; and other duties. In order to perform all of these duties, attorneys are working well in excess of a regular work week.

V. COURT APPEARANCES

Parties to Commission decisions have the right under Chapter 30A § 14 to appeal those decisions within 30 days to the Superior Court. Less than 8% of Commission decisions are appealed, and the majority of those are affirmed by the Courts. Yet, court cases consume a considerable amount of Commission time. Writing a brief can take a week, as can researching a case. Time in court takes anywhere from a few hours to a week; and at least another day can be spent preparing oral arguments and attending to miscellaneous details.

VI. ADDITIONAL FUNCTIONS

1. Public Information and Community Relations

The Commission believes that an informed and educated public contributes to the maintenance of stable labor relations. The more knowledgeable employees and employers are of the law, the better they will be able to abide by it, and take advantage of their rights under it. The Commission therefore makes every effort to provide information to the public and to meet with groups of employers and employees.

Our public information officer provides a link from the Commission to the media and the general public. The public information officer answers questions from the press concerning the status of various cases before the Commission and issues press releases when the Commission renders important decisions. The information officer is also responsible for the bi-monthly MLRC News which provides information about the day-to-day functioning of the Commission for labor relations professionals, including labor and management representatives. Each issue contains articles highlighting some of the Commission's more interesting cases; analysis of some aspect of Massachusetts General Laws Chapter 150E or 150A, or outside "Section 4"; information about people at the Commission; legislative updates; and statistics on the Commission's caseload. MLRC News is provided free of charge. Nearly 400 labor professionals including those from other states and Canada receive the News by mail.

Each day an attorney or examiner is assigned to aid the many people who call or walk into the Commission with labor-related problems. Although the Commission cannot always solve such problems, the "officer of the day" offers advice on where to seek assistance. The Commission established the officer of the day position last year, because it has an obligation to assist the large number of people who do not understand the maze of administrative agencies regulating the employer-employee relationship.

The Commission supplies information to three local professional publications in order to keep practitioners in the field of public sector labor relations informed. The Massachusetts Labor Relations Reporter publishes information concerning decisions, court cases, hearing elections, complaints, and all other activities; Massachusetts Labor Cases prints all Commissions decisions in full; and Massachusetts Lawyers Weekly prints summaries of Commission decisions. Commission decisions are also frequently reported in the Government Employee Relations Report, the Bureau of National Affairs Labor Relations Reference Manual, and the Commerce Clearing House Labor Cases.

The Commission actively participates in the Boston Bar Association's Workshop for Labor Relations Practitioners. Commissioners or staff members have spoken at the Massachusetts Fire Chiefs Conference, the New England Public Employers Association, the Association of Massachusetts Town Counsels and City Solicitors, and the Institute of Industrial Relations at Holy Cross College.

Commission agents travel across the state in an effort to make its services more accessible. Most elections are conducted at the place of employment by the Commission agent. Commission agents also travel periodically to the western part of the state to conduct informal, formal, expedited hearings.

2. Union Registration and Union Contract File

Sections 13 and 14 of Chapter 150E require the Labor Relations Commission to maintain a list of employee organizations, and the bargaining units they represent. Required information includes: the name and address of current officers; an address where notices can be sent; date of organization; date of certification; and the expiration date of signed agreements. Each organization must also file an annual report with the Commission containing: "the aims and objectives of such organization, the scale of dues, initiation fee, fines and assessments to be charged to the members, and the annual salaries to be paid officers." This information is reported on standardized forms, which are available to the public.

Public employers are required to file copies of all collective bargaining agreements with the Commission.

FINANCIAL STATMENT - FISCAL YEAR 1978

July 1, 1977 - June 30, 1978

Received from General Appropriation.....		$ 490,000.00
Expenditures		
Salaries	$ 426,217.14	
Special Services	7,564.26	
Supplies	29,396.07	
Travel	4,449.50	
Other Services & Expenses	21,272.09	
		$ 488,899.06
Balance Unexpended returned to State Treasury		$ 1,100.94
Income from Sale of Stenographic Records		$ 4,639.75

FINANCIAL STATEMENT - FISCAL YEAR 1977
July 1, 1976 - June 30, 1977

Received from General Appropriation.....		$449,800.00
Expenditures		
Salaries	$367,250.00	
Special Services	10,635.00	
Supplies	30,500.00	
Travel	4,800.00	
Other Services & Expenses	27,964.00	
Total	$441,149.00	$441,149.00
Balance Unexpended Returned to State Treasury	$ 8,651.00	$ 8,651.00
Income from Sale of Stenographic Records	$ 4,720.00	$ 4,720.00

July 1, 1977 - June 30, 1978

PERSONAL SERVICES

Salaries as of June 30, 1978

James S. Cooper	Chairman	$ 24,846.48
Garry J. Wooters	Member, Labor Relations Commission	22,796.52
Joan G. Dolan	Member, Labor Relations Commission	22,796.52
Ann DaDalt	Executive Secretary	18,884.32
Robert B. McCormack	Counsel II	22,514.96
James M. Litton	Counsel II	20,228.00
David F. Grunebaum	Counsel II	19,465.68
Frederick V. Casselman	Counsel II	18,703.36
Stuart A. Kaufman	Counsel II	19,465.68
Philip Dunn	Counsel I	16,072.68
Sharon H. Ellis	Counsel I	16,072.68
Jean S. Driscoll	Labor Relations Examiner	14,646.84
John L. McLaughlin	Labor Relations Examiner	18,228.60
Judith A. Wong	Sr. Employee Relations Examiner	15,840.76
Jacqueline A. Young	Labor Relations Examiner	14,646.84
Priscilla A. Lyons	Asst. to Executive Secretary	13,130.52
Ralph Lyons	Hearings Stenographer	14,345.24
Norener K. Reid	Hearings Stenographer	13,050.44
Alice T. Hintsa	Hearings Stenographer	14,345.24
Rita Alberti	Confidential Secretary	11,755.64
Diane M. Drapeau	Election Specialist	11,755.64
Shirley DeMarco	Election Specialist	11,755.64
Arthur S. Weber	Head Clerk	10,627.24
Catherine M. Burke	Principal Clerk	9,118.20
Dale E. Smith	Principal Clerk	9,118.20
Janice Zimmermann	Sr. Clerk & Stenographer	8,437.00
Ourania Trypousis	Sr. Clerk & Stenographer	8,437.00
Patricia A. Ciampa	Senior Bookkeeper	8,920.60
William A. Blanning	Sr. Clerk & Stenographer	8,437.00
Suzanne F. Sheats	Jr. Clerk & Stenographer	7,654.40
		446,097.92

Vacant Positions		
Sr. Employee Relations Examiner	$14,647.00	
Sr. Clerk & Stenographer	8,437.00	
Sr. Clerk & Typist	8,159.00	
Sr. Clerk & Typist	8,159.00	39,402.00
		485,499.92

July 1, 1976 - June 30, 1977

PERSONAL SERVICES

Salaries as of June 30, 1977

James S. Cooper	Chairman	$ 23,850.20
Garry J. Wooters	Commissioner	21,850.20
Rita Alberti	Principal Clerk	10,153.00
Frederick V. Casselman	Counsel II	17,113.20
Patricia Ciampa	Sr. Clerk and Typist	7,729.80
Ethel Conrad	Sr. Clerk and Stenographer	7,787.00
Ann Da Dalt	Labor Realtions Examiner	14,482.00
Mary DiBlasio	Sr. Clerk and Stenographer	7,787.00
Philip J. Dunn	Sr. Employee Relations Examiner	13,899.60
Sharon H. Ellis	Labor Relations Examiner	13,899.60
David F. Grunebaum	Counsel II	17,856.80
Alice T. Hintsa	Hearings Stenographer	13,605.80
Stuart A. Kaufman	Counsel II	17,856.80
Sharon Kinney	Jr. Clerk and Stenographer	7,004.40
Mary J. Lally	Labor Relations Examiner	17,394.00
Jean Lewis	Sr. Clerk and Stenographer	8,512.40
James M. Litton	Counsel II	18,600.40
[illegible]h Lyons	Hearings Stenographer	13,605.80
[illegible]ert McCormack	Counsel II	20,831.20
John L. McLaughlin	Labor Relations Examiner	17,394.00
Ezaura P. Palys	Principal Clerk	9,591.40
Norener Reid	Hearings Stenographer	11,921.00
Harvey M. Shrage	Asst. to Executive Secretary	12,420.20
Ourania Trypousis	Sr. Clerk and Stenographer	7,787.00
Maria Walsh	Sr. Bookkeeper	7,787.00
Arthur S. Weber	Head Clerk	9,635.60
Karen Zweig	Sr. Employee Relations Examiner	13,899.60
		$273,442.20

Vacant Positions		
Executive Secretary	$18,033.60	
Administrative Secretary	11,078.60	
Commissioner	21,850.20	
	$50,962.40	$ 50,962.40
		$324,404.60

Preface: Jurisdiction

The Massachusetts Labor Relations Commission (Commission) was created in 1937 when the General Court enacted the "Baby Wagner Act", St. 1937, c.436. This statute appears as G.L.c.150A and covers all employers except the Commonwealth or any political subdivision thereof. The Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. §141 et. seq., covers employers engaged in interstate commerce and preempts the Commission's exercise of jurisdiction, Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Foley, Hoag & Eliot, 2 MLC 1302 (1976); Foley, Hoag & Eliot, 229 NLRB No. 80 (1977), 95 LRRM 1041. The National Labor Relations Board (Board) declines to exercise its jurisdiction in a relatively narrow area and is prohibited by law from reducing its jurisdictional standards below those standards in effect on August 1, 1959. 29 U.S.C. §164(c)(1). Recent amendments to the LMRA have expanded the Board's jurisdiction to include health care institutions. P.L. 93-360 (1974). Under the LMRA the Board does not have jurisdiction over any state or any political subdivision thereof. 29 U.S.C. §152(2).

In 1964 and 1965 the General Court enacted laws granting certain bargaining rights to state and municipal employees. St. 1964, c.637; St. 1965, c.763. In 1973, the General Court repealed the public sector collective bargaining statutes and enacted a comprehensive bargaining law applicable to all public employees. St. 1973, c.1078. The new statute appears as G.L.c.150E. (hereinafter referred to as "the Law").

One of the more confusing questions of jurisdiction concerns bus drivers.The Board policy is to decline jurisdiction over that part of a transportation enterprise engaged in transporting school children for any political subdivision of a state, and the Commission will assert jurisdiction in those cases. Hudson Bus Lines, 4 MLC 1630 (1977); Lexington Taxi Corp., 3 MLC 1696 (1977); William S. Carroll, Inc., 3 MLC 1627 (H.O., 1977);*cf. Mitrano Chevrolet-Main Street Garage, 2 MLC 1533 (1976).

I. Definitions

A. Employer

The term "employer" or "public employer" is defined as the Commonwealth acting through the commissioner of administration, or any county, city, town or a district acting through its chief executive officer. The term "employer" also includes "any individual who is designated to represent one of these employers and acts in its interest in dealing with public employees". One of the troublesome areas of applying this definition concerns county government. In one case, County of Hampden and Sheriff of the County of Hampden, 3 MLC 1076 (H.O., 1976), a hearing officer found that the employer of employees of the sheriff's office was the county, but that the chief executive officer under the Law was the sheriff and the county

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* "H.O." denotes decisions issued by a duly designated hearing officer of the Commission; other citations are to decisions of the full Commission. Both Commission and hearing officer decisions are reported in Massachusetts Labor Cases, (MLC) which is published by the Massachusetts Labor Relations Reporter, P.O. Box 48, Boston, Massachusetts, Ma. 02101. Copies of decisions may be ordered directly from the publisher.

commissioners in a joint capacity. In reaching this conclusion, the hearing officer examined the difficulties in bargaining with the county commissioners or the sheriff individually; the problems in the appropriation process; and the possible consequences in unfair labor practice cases. Although County of Hampden, involved a representation case, another hearing officer found joint chief executive officers in the Essex County Commission and the Board of Trustees of its Agricultural and Technical Institute. County of Essex, 4 MLC 1230 (H.O., 1977). However, on the municipal level see the Supreme Judicial Court's opinion with respect to joint chief executives in Labor Relations Commission v. Town of Natick, Mass. Adv. Sh. (1976) 31, 339 N.E. 2d 900. Recent amendments to the Law have included the Chief Justice, Supreme Judicial Court employees (c.278, Acts of 1977), housing authority employees (c.610, Acts of 1977), and employees of the State Lottery Commission (c.937, Acts of 1977). In addition, chapter 760 of the Acts of 1962 applies certain provisions of chapter 150A to the Massachusetts Port Authority, the Massachusetts Parking Authority, the Massachusetts Turnpike Authority, and the Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority. Redevelopment authorities are not within the jurisdiction of the Commission, Fall River Redevelopment Authority, 4 MLC 1690 (1978). A Commission hearing officer has found a water pollution abatement district to be a public employer under the Law. Upper Blackstone Water Pollution Abatement District, 4 MLC 1156 (H.O. 1977).

B. Employee

The term "employee" has been broadly interpreted to encompass all individuals employed by a public employer, except those specifically excluded by the Law. City of Fitchburg, 2 MLC 1123 (1975). Thus, coverage of the Law extends to regularly employed part-time employees, Pittsfield School Committee, 2 MLC 1271 (1976); County of Plymouth, 2 MLC 1106 (1975), including part-timers who are full-time students, Quincy Library Department, 3 MLC 1517 (1977). Probationary employees are entitled to protection under the Law, as are CETA employees. City of Springfield, 2 MLC 1233 (1975); City of Fitchburg, 2 MLC 1123 (1975). The Commission has also determined that hospital interns, residents, and fellows are employees, despite contrary Board rulings. City of Cambridge, 2 MLC 1450 (1976); Worcester City Hospital, 3 MLC 1290 (H.O., 1976) aff'd 4 MLC 1373 (1977). However, employees of a private bus company which has contracted with a city to bus school children are not considered public employees, Hudson Bus Lines, 4 MLC 1630 (1977).

1) Managerial Employees

Under the Law, employees shall be designated as managerial employees excluded from coverage only if they (a) participate to a substantial degree in formulating or determining policy, (b) assist to a substantial degree in the preparation for or conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

A position must be funded and filled before the issue of managerial exclusion may be raised. Town of Wellesley, 2 MLC 1443 (1976). The Commission scrutinizes employees' actual duties and responsibilities, without respect to those which may be performed in the future. County of Worcester, 2 MLC 1273 (1976). Its analysis is functional, rather than merely looking to titles, Masconomet Regional School District, 2 MLC 1034 (1976); Wellesley School Committee, 1 MLC 1389 (1975). In order for employees to be excluded as "managerial", their participation in any one of the disjunctive requirements must be substantial, Lee School Committee, 3 MLC

1496 (1977); Taunton School Committee, 1 MLC 1480 (1975); Town of Dedham, 4 MLC 1347 (H.O., 1977).

Exercise of supervisory authority, without more, does not make an individual "managerial" within the meaning of the Law. Worcester School Committee, 3 MLC 1653 (1977); University of Massachusetts, 3 MLC 1179 (1976). For example, evaluation of subordinates which is subject to review and approval and which has limited impact upon personnel decisions is insufficient to exclude an employee as "managerial". Masconomet Regional School District, 3 MLC 1034 (1976). New Bedford School Committee, 2 MLC 1215 (1975); Framingham School Committee, 4 MLC 1298 (H.O., 1977).

A managerial employee's role in formulating policy must be more than advisory and must have a significant impact upon a considerable part of the public enterprise. Contrast Masconomet Regional School District, supra with Wellesley School Committee, supra; Worcester School Committee, 3 MLC 1653 (1977); Needham School Committee, 3 MLC 1251 (1976); Town of Carlisle, 4 MLC 1538 (H.O., 1977); Worcester Vocational School Department, 4 MLC 1277 (H.O., 1977); City of Northampton, 4 MLC 1352 (H.O., 1977). Where the personnel in question act merely as policy conduits from whom suggestions are sometimes elicited, there is no managerial exclusion. Holyoke School Committee, 4 MLC 1607 (1977).

Administrators who have never exercised appellate responsibility in the grievance process and have only participated on isolated occasions in collective bargaining are not managerial employees. Wellesley School Committee, 1 MLC 1389 (1975). Moreover, administrators who review contract proposals concerning the teachers' unit to prevent a possible adverse impact on their own employment do not substantially participate in collective bargaining. Town of Holbrook, 1 MLC 1468 (1975).

2) Confidential Employees

Confidential employees are excluded from coverage under the Law. The Commission applies the confidential exclusion narrowly and balances the broad extension of collective bargaining rights against the potential danger of disrupting the employer's operations. Silver Lake Regional School Committee, 1 MLC 1240 (1975); Stoneham School Committee, 3 MLC 1390 (H.O., 1977).

Employees are confidential "only if they directly assist and act in a confidential capacity" to a person excluded from the coverage of the Law. An employee must have a continuing and substantial relationship with a managerial employee of such a nature that there is a legitimate expectation of confidentiality in their routine and recurring dealings. Littleton School Committee, 4 MLC 1405 (1977). However, employees may directly assist excluded employees without assisting them in a confidential capacity. University of Massachusetts, 3 MLC 1179 (1976). Thus a managerial employee's reliance upon another employee as a conduit for policy advice and personnel recommendations does not, standing alone, render the latter a "confidential employee". See University of Massachusetts, 3 MLC 1179 (1976). Similarly, access to sensitive material, such as financial data or personnel records, without more, does not necessarily make an employee "confidential". Wellesley School Committee, 1 MLC 1389 (1975); Blackstone-Millville Regional School District, 4 MLC 1312 (H.O., 1977).

In contrast, however, employees who regularly type contract proposals for use by the employer in collective bargaining negotiations have been excluded as "confidential". Silver Lake Regional School Committee, 1 MLC 1240 (1975). Secretaries to school superintendents and school committees have generally been excluded. Belchertown School Committee, 1 MLC 1304 (1975); Fall River School Committee, 3 MLC 1591 (H.O., 1977); Stoneham School Committee, 3 MLC 1390 (H.O., 1977). Secretaries who have regular and substantial exposure to labor relations information and advance knowledge of bargaining positions have been held to be "confidential", Worcester School Committee, 4 MLC 1015 (H.O., 1977).

II. Employee Rights To Organize And Bargain Collectively

Section 2 of the Law provides that "employees shall have the right to self-organization and the right to form, join or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing". Furthermore, this section gives employees the right "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion".

A. Protected Activities

Protected activities include: making pro-union speeches, Mount Wachusett Community College, 1 MLC 1496 (1975); seeking the assistance of a union, Commonwealth of Massachusetts, 2 MLC 1400 (1976); soliciting union authorization cards and serving as union steward, Town of Wareham, 3 MLC 1334 (1976); serving as union officer and member of union negotiating committee and protesting the employer's unilateral changes in working conditions, Town of Sharon, 3 MLC 1052 (1976); initiating a grievance under a collective bargaining agreement, Town of Halifax, 1 MLC 1486 (1975); prosecuting a grievance not within the context of a contractual grievance procedure, Harwich School Committee, 2 MLC 1095 (1975); testifying before the Commission, City of Boston, 4 MLC 1033 (1977); distributing leaflets and collecting signatures on a petition as an adjunct to the formal grievance procedure, City of Boston, 4 MLC 1101 (1976); insisting upon the presence of a union representative at an investigatory interview reasonably perceived as potentially leading to discharge. Commonwealth of Massachusetts, 4 MLC 1415 (1977); editing and publishing a union newsletter, Mount Wachusett Community College, 1 MLC 1496 (1975); non-disruptive picketing of school committee meetings, homes and businesses of school committee members, and distribution to parents of leaflets in support of union organizational or bargaining objectives, Southern Worcester County Regional Vocational School District, 2 MLC 1488 (1976); see also City of Fitchburg, 2 MLC 1123 (1975).

B. Unprotected or Illegal Activities

Picketing or leafleting by public employees or an employee organization in support of an unlawful strike is not protected activity. See Commonwealth of Massachusetts, SI-29, (1976); Town of Franklin, SI-56, (1977).

Improper tactics intended to coerce the employer into accepting the union's position, or illegal activities such as acts of vandalism, are not protected activity. See City of Fitchburg, 2 MLC 1123 (1975). Conduct which is physically intimidating, egregious or disruptive of the employer's business is also unprotected. Harwich School Committee, 2 MLC 1095 (1975).

III. Appropriate Bargaining Units

A. Statutory Criteria

The Legislature has mandated that the Commission give consideration to three criteria: community of interest; efficiency of operations and effective dealings; and safeguarding the rights of employees to effective representation. These criteria are balanced to serve the fundamental statutory objective of providing for stable and continuing labor relations.

1) Community of Interest

The "touchstone" of community of interest is a demonstration that the requested employees comprise a coherent, homogeneous group with employee interests sufficiently distinct from those of excluded employees to warrant separate representation. Among the factors to be considered are: common supervision; similar work environment; job requirements; education; training and experience; and job interchange and work contact. Boston School Committee, 2 MLC 1557 (1976); Town of Sterling, 4 MLC 1473 (H.O. 1977).

Community of interest does not, however, require an identity of interest. So long as there is no inherent conflict among consolidated groups of employees, they need only be similarly, not identically, situated. Differences in work locations and supervision need not destroy community of interest. Town of Harwich, 1 MLC 1376 (1975). Thus, the professional faculty of the statewide network of community colleges were placed in one overall unit rather than in individual units at each campus. Community Colleges, 1 MLC 1426 (1975). Nurses with different work schedules have been placed in a single unit. Town of Agawam, 3 MLC 1681 (H.O., 1976). At the University of Massachusetts, department chairmen, part-time faculty, librarians, and coaches were found to share a community of interest with full-time "tenure track" faculty. University of Massachusetts, 3 MLC 1179 (1976). Employees of a parks and recreation department were found to share a community of interest with employees of a public works department. Town of Agawam, 4 MLC 1060 (H.O., 1977).

2) Efficiency of Operations and Effective Dealings

The "efficiency of operations and effective dealings" criterion has evolved into the policy of including employees in the largest practicable bargaining unit. Community Colleges, 1 MLC 1426 (1975); Boston School Committee, 2 MLC 1557 (1976). In assessing a unit's potential effect, the Commission considers the impact on the public employer's performance of its primary mission. Community Colleges, 1 MLC 1426 (1975).

Central to the required analysis is scrutiny of the employer's structure, delivery of services, and fiscal administration. University of Massachusetts, 3 MLC 1179 (1976). Given a finding of community of interest among employees sought in separate units, the Commission has ordered single, larger units coextensive with the employer's administrative structure. Town of Agawam, 3 MLC 1681 (H.O., 1976); Community Colleges, 1 MLC 1426 (1975).

3) Safeguarding Employee Rights to Effective Representation

G.L.c.150E precludes creation of a unit structure which would impair employees' statutory rights. Statement in Support of Adoption of Amendment to Rules and Regulations of the Commission Creating Statewide Occupational Units, 1 MLC

1319 (1975). Thus, the Commission avoids establishing units with a diversity of employment interests so marked as to produce inevitable conflicts in negotiating and administering collective bargaining agreements. University of Massachusetts, Union of Student Employees, 4 MLC 1384 (1977).

As noted above, the Commission considers bargaining history, employee wishes, extent of organization, and the structure and practices of the particular workforce. Critical in safeguarding employee rights to effective representation, however, is the avoidance of units in which conflict is inherent because of an absence of community of interest among the employees. See Statement...Creating Statewide Occupational Units, 1 MLC 1319 (1975).

B. Policy Considerations

1) Commission Discretion

Within certain statutory limits, the Commission has broad discretion determining appropriate bargaining units. University of Massachusetts, 4 MLC 1384 (1977). Exclusions of certain types of employees may be derived from the overriding legislative purpose, see Commonwealth of Massachusetts, SCRX-2 (1973). Where the union's petition describes an appropriate unit, the Commission will not reject that unit because it is not the only appropriate unit, or because there is an alternative unit that is more appropriate. Town of Agawam, 4MLC 1060 (H.O., 1977); Lynn Hospital, 1 MLC 1046 (1974).

2) Policy Favoring Broad, Comprehensive Units

The Commission has continually affirmed its policy that broad, comprehensive units, rather than small, fragmented units, best facilitate stable and continuing labor relations. Generally, the largest unit sought will be found to be an appropriate unit, provided there is sufficient community of interest among the petitioned-for employees. Pittsfield School Committee, 3 MLC 1490 (1977); University of Massachusetts, 3 MLC 1179 (1976); City of Quincy, 3 MLC 1012 (1976); Community Colleges, 1 MLC 1426 (1975); Town of Sterling, 4 MLC 1473 (H.O., 1977).

In keeping with the principle of the desirability of large units, the proliferation of small units has not been encouraged. The Commission has refused to approve the creation of small separate units where there are existing units whose members share a community of interest with employees seeking a separate unit. Quincy Library Department, 3 MLC 1517 (1977); Pittsfield School Committee, 3 MLC 1493 (1977); City of Lowell, 3 MLC 1261 (1976); Barnstable County, 3 MLC 1144 (1976). Where there is the requisite community of interest, separate smaller units have been rejected in favor of a single large unit. Boston School Committee, 2 MLC 1557 (1976); Town of Dartmouth, 1 MLC 1257 (1975); Town of Agawam, 3 MLC 1681 (H.O., 1976).

3) Unit Stipulations

When both an employer and an employee organization agree on the composition of a bargaining unit, the Commission will generally adopt their agreement.

The Commission will not look beyond the clear meaning of a stipulation mutually agreeable to both parties. Medford Housing Authority, 4 MLC 1458 (H.O., 1977). The possibility that another unit may be equally or more appropriate will not preclude the Commission's acceptance of a stipulation for a unit which is itself

valid. Board of Trustees, State Colleges, 4 MLC 1428 (1977). An agreement of the parties may, however, be rejected by the Commission if the stipulated unit is contrary to law or policy. City of Lowell, 3 MLC 1260 (H.O., 1976), aff'd 3 MLC 1510 (1977).

4) Other factors

a.) History, Extent of Organization, and Employee Wishes

In its unit determinations, the Commission also considers bargaining history, extent of organization, and the wishes of employees. Town of Agawam, 4 MLC 1060 (H.O., 1977). Although bargaining history and employee wishes are taken into account, they are factors lacking controlling weight. Boston School Committee, 2 MLC 1557 (1976); Community Colleges, 1 MLC 1426 (1975). Employee wishes become an important factor only where there is a decision to be made between two or more equally appropriate units. Weymouth School Committee, MCR-2427, 2428 (8/5/77).

The Commission has repeatedly stated that employee organizations may not pick and choose among employees sharing a community of interest on the basis of extent of organization. It must be demonstrated that the group has a community of interest separate and distinct from other employees. Lynn Hospital, 1 MLC 1023 (1974).

b.) Source of Funding

The source of funding of an employee's position is not dispositive in unit determination. A finding of community of interest between employees funded from sources other than the public employer and employees paid directly by the public employer will lead to an overall unit which includes CETA employees. City of Springfield, 2 MLC 1233 (1975); Town of Sheffield, 4 MLC 1144 (H.O., 1977); (Title I teachers), Somerville School Committee, 4 MLC 1244 (H.O., 1977). A contrary result follows if there is an insufficient community of interest between two groups. City of Fall River, 3 MLC 1320 (H.O., 1977) (teacher aides and lunchroom aides); Somerville School Committee, 4 MLC 1244 (H.O. 1977) (Project SCALE teachers).

C. Separate Supervisory Units

Unlike the National Labor Relations Act, Chapter 150E does not exclude supervisory employees from participation in collective bargaining. However, the Commission favors units of supervisors separate from rank and file units. Chicopee School Committee, 1 MLC 1195 (1974).

In determining whether employees are supervisors who should be placed in a separate unit, the Commission examines both supervisory authority and the total relationship between employees, City of Revere, 4 MLC 1593 (H.O., 1977), aff'd., 4 MLC__(1978); University of Massachusetts, 3 MLC 1179 (1976). Supervisors are employees with independent authority or effective recommendatory powers in major personnel decisions such as hiring, transfer, suspension, promotion, and discharge. They also have the authority to direct employees and to resolve grievances. University of Massachusetts, 3 MLC 1179 (1976). When supervisory power is shared to a great degree with other employees and no conflicts are apparent, employees will not be placed in a separate unit. University of Massachusetts, 3 MLC 1179 (1976).

In the area of professional school employees and police officers, the Commission has stated in numerous cases that it favors the creation of two units separating administrative employees from those they supervise. City of Taunton, 3 MLC 1686 (H.O., 1977); City of Everett, 3 MLC 1372 (1977); Chicopee School Committee, 1 MLC 1195 (1974). It may depart from this approach and allow an over-all unit only in small towns where the size of an administrative unit would significantly impair the bargaining strength of the administrators. Cambridge Police Department, 2 MLC 1027 (1975); Chicopee School Committee, 1 MLC 1195 (1974).

D. Employees Other Than Regular Full-Time Employees

1) Part-Time Employees

Litigation in this area has involved part-timers, seasonal employees, and those whose salary comes from a source other than the Chapter 150E public employer. The Commission has repeatedly held that individuals other than regular full-time workers are "employees" within the meaning of Chapter 150E. Pittsfield School Committee, 2 MLC 1523 (1976); City of Springfield, 2 MLC 1233 (1975); Town of Lincoln, 1 MLC 1422 (1975); Town of Burlington, 3 MLC 1350 (H.O., 1977). Thus, the issue in these cases is the statutory standards described in Section A above.

Part-time employees who have a substantial community of interest in wages, hours, and working conditions with those in a unit of full-timers are regarded as "regular" part-time employees and will be included in the bargaining unit. Town of Swansea, 3 MLC 1678 (H.O., 1977), aff'd 4 MLC 1527 (1977); Quincy Library Dept., 3 MLC 1517 (1977); University of Massachusetts, 3 MLC 1179 (1976); Southboro School Committee, 2 MLC 1467 (1976); County of Plymouth, 2 MLC 1106 (1975); (part-time police officers), Town of Sterling, 4 MLC 1473 (H.O., 1977). If, however, part-time employees lack a community of interest with full-timers, they will be excluded from the unit. Town of Lincoln, 1 MLC 1422 (1975); Town of Hamilton, 2 MLC 1512 (H.O., 1976).

Part-timers seeking a separate unit must demonstrate a community of interest among themselves for the Commission to find such a unit appropriate. A similarity of interests has been deemed sufficient to warrant a separate unit of evening school teachers, Pittsfield School Committee, 2 MLC 1523 (1976). Relative stability of part-time work force, consistency in hours, and clearly definable boundaries of bargaining unit are factors weighing in favor of a separate part-timers' unit. Gloucester School Committee, 4 MLC 1497 (H.O., 1977). Where these factors are not present, a separate unit is inappropriate. Town of Lincoln, 1 MLC 1422 (1975); Town of Saugus, 4 MLC 1361 (H.O., 1977).

2) Seasonal and Casual Employees

The appropriateness of bargaining units containing substantial numbers of "seasonal" employees has normally been determined based upon the employees' expectation of continuing employment. Similarly, employees are not considered "casuals" where their hours are regular and consistent and there is a reasonable expectation of rehire or reassignment on a year-to-year basis. Gloucester School Committee, 4 MLC 1497 (H.O., 1977). If there is substantial stability in the work

force, year after year, the "seasonals" are either included in a bargaining unit with the regulars, or held to constitute their own separate unit. Bay State Harness Raceway, 2 MLC 1340 (1976); City of Gloucester, 1 MLC 1170 (1974). Where, however, the public employer's required budgetary process would make effective bargaining for seasonal employees impossible, a separate unit has not been allowed. City of Gloucester, 1 MLC 1170 (1974).

E. Modification of Existing Bargaining Units

The Commission has broad power to investigate and decide representation questions arising out of existing units. See City of Boston, 2 MLC 1353 (1976). This includes the power to exclude from existing units employees who are managerial. Wellesley School Committee, 1 MLC 1389 (1975); confidential, Silver Lake Regional School Committee, 1 MLC 1240 (1975); or otherwise inappropriately included, City of Boston, 2 MLC 1353 (1976). A CAS petition is a petition for clarification of the bargaining unit and must be filed by the employer or the employee organization. An individual has no standing to file a CAS petition; however, he or she has a more limited right to request the Commission under MLRC Rules to investigate a matter concerning certification. See MLRC Rule 14.15* Town of Burlington, MCR-2452, CAS-2120, 4 MLC __ (H.O., 1978).

1) Severance and Exclusion

Petitions seeking to sever employees from currently existing units are normally not favored. Saugus School Committee, 2 MLC 1412 (1976). It must be proved that the employees sought constitute a functionally distinct group with special interests sufficiently distinguishable from those of other unit employees. Evidence must indicate special negotiating concerns which have caused significant divisions within the existing bargaining unit. The Commission also considers the industry practice of inclusions and exclusions from over-all units the employees seek to sever. Saugus School Committee, 2 MLC 1412 (1976); City of Beverly, 1 MLC 1108 (1974). The petitioner must demonstrate that the stability of labor relations and effective representation will not be unnecessarily compromised by the severance. Massachusetts Port Authority, 2 MLC 1408 (1976).

In cases involving severance of police supervisors, however, the issue is generally not whether there should be a separate supervisory unit but where the division should be made once the department has reached a sufficient size. Cambridge Police Department, 2 MLC 1027 (1975). The Commission's standard for determining at which rank to sever police units is based on finding the rank at which the distinction between supervisory and non-supervisory responsibilities is manifested. Intra-union conflict at the bargaining table may be relevant. This question remains undecided. City of Everett, 3 MLC 1372 (1977); City of Taunton, 3 MLC 1686 (H.O., 1977).

Separate units for superior officers in fire departments have not been created where there is a long history of collective bargaining in an overall unit. Town of Dedham, 3 MLC 1130 (H.O. 1976), aff'd 3 MLC 1332 (1976), reaff'd 4 MLC ___ (1977); but see Town of Greenfield, 4 MLC 1225 (H.O., 1977) where a Commission hearing officer excluded deputy chiefs because of their extensive supervisory authority (including the administration of discipline) and the absence of a long bargaining history in an overall unit.

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*The Rules and Regulations of the Commission appear as Chapter 402 of the Code of Massachusetts Regulations (CMR). The official cite 402 CMR 14.15 is abbreviated herein as MLRC Rule 14.15.

2) Stipulations by the Parties

Where both employer and the employee organization stipulate that certain confidential positions should be excluded from a previously issued certification, the Commission will adopt that stipulation as long as it is not in conflict with the Commission's rules or established practices. When the Commission has previously determined the appropriate bargaining unit and the employer refuses to bargain because of alleged inappropriateness of the unit, the decision will stand unless the employer can show changed circumstances. Needham School Committee, 4 MLC 1120 (1977).

If both parties have agreed to include an employee in a unit and subsequently one of the parties seeks exclusion over the objection of the other, the party seeking exclusion may be estopped for at least the duration of the collective bargaining agreement. City of Somerville, 2 MLC 1546 (1976); Pittsfield School Committee, 3 MLC 1082 (1976).

3) Accretion

The Commission in several cases has enunciated the principles to be applied when a party seeks to accrete job classificiations to an existing bargaining unit. Accretion will be permitted when: (1) a new employee classification has been created; (2) an employer's operations have been expanded subsequent to a certification and employees are normal accretions; or, (3) the job function of the disputed title has changed significantly since certification or recognition. Additionally, the Commission will look to the intent of the parties at the time of certification or recognition and the community of interest between the disputed employees and members of the unit. Peabody School Committee, 3 MLC 1512 (1977); City of Lynn, 2 MLC 1541 (1976); University of Massachusetts, Boston, 2 MLC 1001 (1975); City of Somerville, 1 MLC 1234 (1975); Amesbury School Committee, 3 MLC 1447 (H.O., 1977).

The Commission will not allow accretion if: (1) the classifications sought by the union were in existence prior to the original election and certification, and were excluded from the unit by the parties; (2) neither certification nor subsequent contracts had included those classifications; (3) the basic job functions of those classifications remains the same; (4) the previously excluded employees do not work in the same area as the unit employees; (5) the employees perform different job functions and have different supervisors. Peabody School Committee, supra; Pittsfield School Committee, 3 MLC 1082 (H.O., 1976); Town of Agawam, 2 MLC 1367 (H.O., 1976).

Where accretion has not been allowed, the Commission may, in rare cases, permit a self-determination election among employees holding the disputed titles. They are given the choice of being represented by the incumbent in an existing unit, or of not being represented in any unit. A self-determination election may be ordered where: the petition is accompanied by a sufficient showing of interest; there is sufficient community of interest between the employees in disputed titles and employees in the existing unit; the petition seeks to include all such employees; and the reasons for the original exclusion no longer pertain. City of Quincy, 3 MLC 1326 (H.O., 1976), aff'd 3 MLC 1517 (1977).

IV. Procedures for Determining Bargaining Representatives

A. Notice

Commission rules require that all interested parties be given notice of representation proceedings. MLRC Rule 14. The petitioning employee organization and the employer have a joint obligation to provide the Commission with information regarding other organizations that may represent any employees affected by the petition. City of Quincy, CAS-2062 (1976).

B. Contract and Certification Bars to Elections

The contract bar doctrine prohibits the direction of an election, except for good cause, if a valid collective bargaining agreement is in effect. The doctrine is discretionary. It will be applied or waived depending on the facts of the case with a view toward fairness for employer and employees alike and stability of bargaining agreements. Easton School Committee, 2 MLC 1111 (1975); Southeastern Mass. University, 1 MLC 1418 (1975).

A contract must be signed by all parties to operate as a bar. Even when the terms were agreed on, the parties had agreed to sign, the contract was in near final form and some provisions had already been implemented, the contract was held ineffective as a bar because it was unsigned. Essex County, 4 MLC 1147 (H.O., 1977); Nashoba Valley Technical High School District, 4 MLC 1589 (H.O., 1977); Somerville School Committee, 2 MLC 1335 (H.O., 1976); Town of Maynard, 2 MLC 1253 (H.O., 1975). An expired contract will not operate as a bar even though the parties agree to continue its terms during negotiations. Brockton School Committee, 4 MLC 1005 (1977); University of Massachusetts, 2 MLC 1001 (1975). A successor contract negotiated and ratified prior to the open period under the existing contract will not bar a petition which would be timely had the new agreement not been negotiated. Saugus School Committee, 2 MLC 1414 (1976). A contract which does not provide benefits for the employees sought in a petition will not act as a bar. Hudson Bus Lines, 4 MLC 1630 (1977).

The expansion of the bargaining unit is not such an unusual occurrence as to waive the contract bar if the complement of employees from the old unit is a substantial part of the new unit and representative of the employees in the expanded unit. North Middlesex Regional School District, MCR-2665, 4 MLC __ (H.O., 1978).

In rare situations, the Commission may approve a contractual waiver of the contract bar rule when such a waiver serves the purposes of the Law. Worcester School Committee, 4 MLC 1015 (H.O., 1977). The rule will not be waived, however, when members of the bargaining unit are dissatisfied with their representative or when intra-union disputes fall short of a schism going to the very identity of the bargaining representative. City of Salem, 1 MLC 1172 (1974); City of Worcester, 1 MLC 1069 (1974).

Notwithstanding the general contract bar rule, MLRC Rule 14.06 provides that an election petition will be entertained if filed during an "open period" of no more than 180 days and no fewer than 150 days prior to the termination date of the contract. A petition must be actually received at the Commission's office within the

180-to-150 day open period. City of Springfield, 1 MLC 1446 (1975). Petitions filed during the open period may be amended after the end of the open period if the amendment does not claim a unit larger and substantially different from that originally sought. Commonwealth of Massachusetts (Unit 4), SCR-2100, (1977).

The certification bar rule provides that no election will be directed in a unit within one year of a prior election. However, a rival petition for certification will be processed by the Commission even though filed prior to the expiration of the cerification year if the election is conducted after the statutory twelve-month period. There must be no contract bar. City of Gardner, 1 MLC 1115 (1974).

C. Representation Petition and Hearings

MLRC Rule 14.05 requires that a petitioning employee organization be designated as the exclusive representative by 30 percent of the employees in the proposed unit. The Commission's review of this showing of interest is an administrative determination which is not subject to challenge. Duxbury School Department, 1 MLC 1020 (1974). Local 829, Teamsters, 4 MLC 1673 (1978). The 30 percent requirement has been met where petitioner based its showing on the employer's inaccurate statement of the number of employees in the unit. Commonwealth of Massachusetts (Unit 4), SCR-2100, (1977).

While an employer may file a representation petition, it will be dismissed where no employee organization seeks recognition or claims majority status in the unit sought. Commonwealth of Massachusetts, 1 MLC 1190 (1974). Employees may petition for a decertification election but must seek a unit coextensive with the previously certified or recognized unit. Decertification elections for a portion of a bargaining unit are not permitted. City of Lynn, 2 MLC 1541 (1976).

A petition may be amended prior to or at the representation hearing if the amended petition does not seek a substantially larger or different unit. Commonwealth of Massachusetts, (Unit 4), SCR-2100, (1977). The Commission will order an election where neither the employer nor the incumbent appears at a scheduled hearing but where the petitioning union presents a sufficient showing of interest. Town of Auburn, MCR-2507, 4 MLC __ (1977). An election may also be directed without a hearing where there are no litigable issues. City of Lowell, MCR-2538, 4 MLC __ (1977). A motion to intervene is untimely where hearings have been closed, an election has been ordered, and where granting the motion would require delaying the election, Town of Duxbury, 4 MLC 1168 (1977).

Generally, unless the charging party requests the Commission to proceed, no election will be directed while unfair labor practices affecting the involved unit are pending. Town of Wareham, 2 MLC 1547 (1976).

D. Elections: Procedures, Objections, and Challenges

1) In General

The Commission exercises wide discretion in the manner and method of conducting representation elections. Community Colleges, 2 MLC 1146 (1975). Thus, on-site or mail ballot elections may be ordered. Furthermore, the Commission has the exclusive power to determine the name of the organization appearing on the ballot in order to insure that the ballot is not confusing to the voters. Department of Public Welfare, 1 MLC 1127 (1974). The Commission's certification runs to the employee organization appearing on the ballot. Commonwealth of Massachusetts (Units 1, 2, 6, 8 and 9), 2 MLC 1322 (1976). The Commission

will adopt the standards applied by the National Labor Relations Board in determining eligibility of voters who were employed on the cut-off date, but who are not actively employed at the time of the election. Town of Dudley, 4 MLC 1291 (1977).

2). Procedure for Challenges

MLRC Rule 14.12 applies to election challenges and objections.

Objections to an election must be filed within five days of the tally of ballots. Only a party in interest can object to an election. Boston School Committee, 3 MLC 1043 (1976). A party seeking to set aside an election because of conduct occurring prior to or during the course of the election must furnish substantial evidence that the conduct had a significant impact on the election results. City of Boston, 2 MLC 1275 (1976).

No post-election hearing will be conducted if the objections do not raise substantial questions of fact or a legally significant basis for setting aside the election. Rockland Police Department, 1 MLC 1217 (1974). City of Brockton, 4 MLC 1005 (1977). Matters raised as objections to the election will not be considered if they should have been raised at the pre-election representation hearing. Rockland Police Dept., 1 MLC 1217 (1974).

The Commission has permitted employees whose managerial status was questioned to vote under challenge. It was ruled that the determination of managerial status would be made after the election and the employees' ballots would not be counted until the challenges were resolved. Community Colleges, 2 MLC 1146 (1975). An employee organization's failure to comply with the filing requirements of sections 13 and 14 of the Law does not require that an election be set aside. See, Commonwealth of Massachusetts, 2 MLC 1322 (1976), where the Commission conditioned certification upon the petitioner's expeditious compliance with the Law's reporting provisions. Sullivan v. Labor Relations Commission, 1977 Mass. App. Adv. Sh. 904, 364 N.E.2d 1099.

3) Misrepresentation and Interference

An election will not be set aside on the ground of misrepresentation unless a party has substantially misrepresented a highly material fact, the truth of which lies within the special knowledge of the party making the misrepresentation. Nor will an election be overturned if the voters have independent knowledge with which to evaluate the misrepresentation or if there was no substantial impact on the election. Commonwealth of Massachusetts, 3 MLC 1067 (1976).

Minimal inaccuracies in the voter eligibility list are not sufficient to invalidate an election. An employer's good faith and substantial effort to provide the list will suffice. City of Quincy, 1 MLC 1161 (1974).

But where one of the parties to a mail election distributed copies of the Commission's specimen ballot with partisan election propaganda superimposed on it, the Commission found that such propaganda issued close to the time of the election, was cause to set that election aside. Commonwealth of Massachusetts, 2 MLC 1261 (1976).

Where there is no allegation of coercion, the mere presence of union agents in a polling area is not a sufficient basis for setting aside an election. Local 829 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 3 MLC 1696 (1977). In a close election, however, the Commission will not certify the results when a large proportion of ballots was cast during a time that employees congregated in the immediate voting area and conversed among themselves. Local 829, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, 3 MLC 1696 (1977).

E. Voluntary Recognition

MLRC Rule 14.06(2) provides for voluntary recognition of an employee organization by the employer. In order to enter into a recognition agreement the employer must: (1) have a good faith belief in the employee organization's majority status in the unit; (2) post a notice of intention to recognize the employee organization for a period of twenty days prior to recognition; and (3) set forth in writing in the agreement the specific unit involved. No recognition may be granted where, during the posting period, a valid petition raising a question of representation has been filed with the Commission.

V. Duty Of Fair Representation

Section 5 of the Law provides that the exclusive representative "...shall be responsible for representing the interests of all [unit] employees without discrimination and without regard to employee organization membership."

The Commission has interpreted this section to impose upon employee organizations a duty to represent fairly all members of the unit in all phases of collective bargaining, including both the negotiating of contracts and the processing of grievances. A breach of this duty is considered a prohibited practice. Framingham School Committee, 2 MLC 1292 (1976). In that case, the Association was found to have breached its duty of fair representation by withdrawing a meritorious grievance without informing the grievant or his attorney, and by refusing to bear one-half the cost of arbitration as provided in the collective bargaining agreement.

Although a union may not arbitrarily ignore a meritorious grievance or process it in a prefunctory manner, it need not formally process every grievance filed if it in good faith determines that a grievance is without merit. Local 285, SEIU, 3 MLC 1646 (1976); Robert W. Kreps and AFSCME, 3 MLC 1087 (H.O., 1976). A union does commit a prohibited practice, however, when it coerces an employee into becoming a union member by suggesting that the quality of representation in the grievance procedure is dependent on union membership. Local 285, SEIU, 3 MLC 1646 (1976).

VI. Duty To Bargain

Section 6 of the Law obligates employers and unions to meet, including meetings in advance of the employer's budget-making process, and to negotiate in good faith about wages, hours, standards of productivity and performance, and any other terms and conditions of employment. Violations of the duty to bargain are prohibited practices under sections 10(a)(5) and 10(b)(2) of the Law.

A. Scope of Bargaining

An examination of the duty to bargain often involves an initial determination of the scope of bargaining, i.e., which subjects must be bargained over and those subjects which may be bargained over.

Scope of bargaining issues are resolved by categorizing disputed subject matters as either mandatory or non-mandatory subjects of bargaining. Town of Danvers, 3 MLC 1559 (1977). If a particular subject is within the mandatory scope of bargaining, either party commits an unfair labor practice when it refuses a demand to negotiate. When a contract includes no waiver clause or other indication that the contract was intended to represent the entire and complete agreement of the parties, those parties have a continuing duty to bargain upon request about all mandatory subjects never bargained or embodied in the contract. City of Salem, 4 MLC 1196 (H.O., 1977).

The parties may bargain over non-mandatory subjects but neither party may bargain to impasse over such subjects. IAFF, Local 1009, 2 MLC 1238 (1975); Plainville School Committee, 4 MLC 1461 (H.O., 1977); Town of Andover, 4 MLC 1081 (1977). While it is clear that an employer does not have the duty to bargain over non-mandatory subjects, the employer must bargain over the impact of a managerial decision which would affect a mandatory subject of bargaining. Leominister School Committee, 3 MLC 1530 (H.O., 1977), aff'd. 4 MLC 1512 (1977); Newton School Custodian Association, 4 MLC 1334 (H.O., 1977); Town of Andover, 3 MLC 1710 (1977); Groton School Committee, 1 MLC 1221 (1975).

1) Mandatory Subjects

In very general terms, mandatory subjects of bargaining are those with a direct impact on terms and conditions of employment. Permissive subjects are those involving core governmental decisions removed from terms and conditions of employment. Town of Danvers, 3 MLC 1559 (1977).

The Commission has held that the following are mandatory subjects of bargaining: initial wages for new unit positions, Melrose School Committee, 3 MLC 1302 (1976); Northeast Regional School Committee, 1 MLC 1005 (1974); insurance costs, Medford School Committee, 4 MLC 1450 (H.O., 1977); working hours, work load, seniority, Medford School Committee, 1 MLC 1250 (1975); work assignments and job duties, Town of Danvers, 3 MLC 1559 (1977); assignment of unit work to non-unit personnel, Town of Andover, 3 MLC 1710 (1977); payday schedules and compensation for added duties, Lawrence School Committee, 3 MLC 1304 (1976); work rules relating to policy on check-cashing time, Norwood School Committee, 4 MLC 1467 (H.O., 1977); promotion procedures; Town of Danvers, 3 MLC 1559 (1976); performance evaluation systems, Town of Wayland, 3 MLC 1724 (1977). Also subject to mandatory bargaining are: residency requirements for continued employment and promotion of unit members, Boston School Committee, 3 MLC 1630 (1977); City of Worcester, 4 MLC 1285 (H.O., 1977); Lynn School Committee, 4 MLC 1104 (H.O., 1977); granting of leave, City of Boston, 3 MLC 1450 (1977); holiday time off, Town of East Bridgewater, 4 MLC 1486 (H.O., 1977); employee use of non-active working time, City of Everett, 2 MLC 1471 (1976); wage re-opener provisions, Medford School Committee, 3 MLC 1413 (1977); number of employees on a piece of firefighting apparatus when it responds to an alarm to the extent that a question of safety is raised, City of Newton, 4 MLC 1282 (1977), aff. City of Newton, 2 MLC 1192 (H.O., 1975); plant rules and on-premise access to employees for the transaction of union business, Town of Marblehead, 1 MLC 1140 (1975); the impact of a layoff decision, Newton School Custodian Association, 4 MLC 1334 (H.O., 1977); implementation of a decision to contract out work previously done by bargaining unit employees, City of Boston, 4 MLC 1202 (1977).

2) Non-Mandatory Subjects

The Commission has found the following topics to be non-mandatory subjects of bargaining: school curriculum decisions, Groton School Committee, 1 MLC 1224 (1974); minimum manning per shift, Town of Danvers, 3 MLC 1559 (1977); wage parity clauses, City of Cambridge, 3 MLC 1587 (H.O., 1977), aff'd 4 MLC 1447 (1977), position consolidations, Lawrence School Committee, 3 MLC 1304 (1976); bargaining open to the public, Town of Marion, 2 MLC 1256 (1975); hiring of additional employees to perform unit work, Town of Andover, 3 MLC 1710 (1977).

In Worcester Police Officials Association, 4 MLC 1366 (1977), the Commission declined to determine whether certain proposals were "legal" where the alleged illegality concerned a mandatory topic which was subject to

B. Good Faith Bargaining

1) In General

The "good faith" requirement of the statute is an intangible factor provable only by inference or implication from the behavior of the parties. It precludes mere surface bargaining, or avoiding a real attempt to reach a resolution while purporting to be meeting for the purpose of bargaining. City of Chicopee, 2 MLC 1071 (1975).

The duty does not compel either party to agree to a proposal or make a concession. It does require, however, that the parties enter into discussions with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences. King Philip Regional School Committee, 2 MLC 1393 (1976); City of Chicopee, 2 MLC 1071 (1975); Berlin-Boylston Regional School Committee, 3 MLC 1700 (H.O., 1977); City of Chicopee, 2 MLC 1071 (H.O., 1975); Plainville School Committee, 4 MLC 1461 (H.O., 1977). In assessing the good faith requirement, the Commission will look not merely to isolated, specific instances of bad faith but to the totality of the parties' conduct, including acts away from the bargaining table. Berlin-Boylston, 3 MLC 1700 (H.O., 1977); King Philip, 2 MLC 1393 (1976).

2) Refusal to Negotiate

Refusal to meet with the union when it has requested a negotiating session is a refusal to bargain in good faith. City of Chelsea, 3 MLC 1169 (1976); City of Chelsea, 2 MLC 1432 (1976).

a.) Attempts to Bypass Union

It is well-established that the duty to bargain collectively with the exclusive representative mandates that an employer may not deal directly with employees on matters that are properly the subject of negotiations with the employees' representative. Thus, an employer who bypasses a union to deal directly with individual employees violates the duty to bargain in good faith. Blue Hills Regional School Committee, 3 MLC 1613 (1977); Lawrence School Committee, 3 MLC 1304 (1976).

b.) Certification: One Year Presumption of Majority Status

During the year following certification a union is irrebutably presumed to have majority status. Thus an employer must bargain with the certified representative during the certification year even if the union has lost majority status. City of Cambridge, 4 MLC 1044 (1977). Similarly, new employees are presumed to support the union in the same proportion as old employees did at the time of the election. Therefore, as a matter of law, evidence of turnover in workforce is irrelevant for the purposes of determining the employer's duty to bargain during the certification year. City of Cambridge, 4 MLC 1044 (1977).

c.) Funding; Bargaining Prior to Budget

An assumption that the legislative body will ultimately reject a funding request does not excuse an initial refusal to negotiate. Middlesex County Commissioners, 3 MLC 1594 (1977). Similarly, the Commission has found a violation of the duty to bargain where an employer refused to schedule bargaining sessions until after its budget had been submitted. In such a situation the employer could not claim that its negotiations were being conducted in good faith when it was locked into its already fixed budget. City of Chicopee, 2 MLC 1071 (H.O., 1975). Nor may a town offer legislation affecting wages and conditions employment to the town council while contract negotiations are in progress, even where the town asserts that the changes will not go into effect until after an agreement with the union is reached. Town of Arlington, 4 MLC 1644 (H.O., 1977).

d.) Effect of Prohibited Practice Charges and Litigation

An employer cannot refuse to bargain because a prohibited practice charge has been brought against it. Similarly, bargaining may not be contingent upon the withdrawal of resolution of pending prohibited practice charges. Commonwealth of Massachusetts, SUP-2078B, (1976); Berlin-Boylston Regional School Committee, 3 MLC 1700 (H.O., 1977); Southern Worcester County Regional Vocational School District, 2 MLC 1488 (1976). Bargaining cannot be delayed or pre-conditioned upon the resolution of pending litigation. Town of Ipswich, 4 MLC 1600 (1977)

3) Employer Negotiator

The employer must appoint a negotiator. City of Chelsea, 3 MLC 1169 (1976). Although an employer does not have to be represented by a person with authority to conclude a binding contract, the character and powers of the employer's representative are factors which are considered in determining whether bargaining has been conducted in good faith. The Commission may find a violation of the duty if the employer's representative has authority to contract and attends none of the bargaining sessions or has no authority to make commitments on any vital or substantive provisions of a proposed contract. The authority of an employer's representative is deficient if it is limited to the transmittal of proposals to and from the employer, discussion concerning such proposals, and the making of recommendations to the employer. Middlesex County Commissioners, 3 MLC 1594 (1977). If an employer representative's authority is limited, the employer must so inform the union. Spencer-East Brookfield School Committee, 3 MLC 1400 (H.O., 1977). Where the authority of the Personnel Board was ambiguous, but they actively supported the agreement before the Selectmen, they bargained in good faith. Town of Millbury, 4 MLC 1267 (H.O., 1977).

4) Open Meetings and Disclosure

Since the environment in which negotiations take place is so important to the proper functioning of the bargaining process, the Commission has found that insistence on bargaining in open session (i.e., bargaining meetings open to the public) violates the Law. Town of Winchendon, 3 MLC 1316 (1976); Town of Marion, 2 MLC 1256 (1975); Town of Norton, 3 MLC 1140 (1976). This applies as well to grievance meetings held during the life of the contract. Ayer School Committee, 4 MLC 1027 (H.O., 1977), aff'd 4 MLC 1478; Webster School Committee, 4 MLC 1692 (H.O., 1978).

The open meeting requirements of G.L.c.39,§.23b do not apply to collective bargaining or grievance meetings under the collective bargaining agreement. Gliglione v. Glennon, Civil Action No. 7194 (Worcester Superior Court 5/31/77). However, this does not preclude negotiations in a public forum if the parties so agree. City of Attleboro, 3 MLC 1408 (1977). The union may waive its right to closed meetings but such waiver must be express, knowing and unequivocal. Ayer School Committee, 4 MLC 1478 (1977). Similarly, it does not mean that the parties may have no access to the press, unless that privilege is voluntarily foregone or overriden by statute, so long as the character, timing and quantity of statements to the press comport with good faith bargaining. Town of Stoneham, 3 MLC 1355 (H.O., 1977). Neither party may require disclosure or the composition of the other side's bargaining team as a condition precedent to negotiations or coerce the other party in its choice of a bargaining representative. Southern Worcester County, 2 MLC 1488 (1976).

5) Process of Negotiations

Although the Law does not compel agreement on any issue, neither party can reject the other's proposals without offering counter-proposals. City of Chelsea, 3 MLC 1048 (H.O., 1977). Nor may a party engage in surface bargaining by rejecting the other side's proposals and tendering its own without attempting to reconcile the differences. Town of Saugus, 2 MLC 1480 (1976). The duty is also violated if a party merely attends a prescribed number of meetings without engaging in meaningful discussions. Southern Worcester County, 2 MLC 1488 (1976). The Commission has found bad faith bargaining where an employer, months after negotiations have begun, offers predictably unacceptable new proposals which violate the parties' express agreement to limit the scope of bargaining to certain subjects. Lawrence School Committee and SEIU, Local 310, MUP-546 (1974). Additionally, given a demand to bargain, the Commission views with disfavor a party's causing long lapses between negotiating sessions. Middlesex County Commissioners, 3 MLC 1594 (1977).

To insist to the point of impasse on the inclusion in an agreement of a permissive subject of bargaining is a violation of the duty to bargain in good faith. Town of Andover, 4 MLC 1081 (1977). After an alleged impasse, the duty to bargain is revived when either party indicates a desire to negotiate in good faith over previously dead-locked issues. Lawrence School Committee, 3 MLC 1304 (1976).

6) Reducing the Agreement to Writing

Where the parties have reached agreement on all substantive issues, the agreement must be reduced to writing. At this point, neither of the parties is free to modify the substantive terms or to insist on the addition of new items or the deletion of agreed upon terms. Blue Hills Regional School Committee, 3 MLC 1613 (1977); Spencer-East brookfield School Committee, 3 MLC 1400 (H.O., 1977). It is

a refusal to bargain in good faith if the union president signs a memorandum outlining the terms for an agreement and the union refuses to execute a contract incorporating those provisions. Belmont School Committee, 4 MLC 1189 (H.O., 1977), aff'd 4 MLC 1707 (1978).

7) Duty to Support the Agreement

The obligation to bargain in good faith includes the duty to support the agreed upon proposals. Thus, where a school committee's negotiating subcommittee agrees to the terms of an agreement, members of the subcommittee must support and vote for the agreement when a vote on acceptance is taken by the entire committee. Spencer-East Brookfield Regional School Committee, 3 MLC 1400 (H.O., 1977). Additionally, the duty to bargain includes the obligation of the employer to support the contract by submitting to the appropriate legislative body and supporting a request for an appropriation to fund the cost items of the agreement. City of Chicopee, 2 MLC 1071 (H.O., 1975); County of Worcester, 1 MLC 1155 (1974); Town of Franklin, 1 MLC 1026 (1974); Mendes v. City of Taunton, 366 Mass. 109, 315 N.E.2d 865, 871 (19740. Not only must the employer support the contract before the legislative body, the employer must also take affirmative action to defeat legislation which would prevent the employer from carrying out the terms of the agreement. Turner Falls Fire District, 4 MLC 1658 (1977).

Where the chairperson of the Board of Selectmen made a sincere but erroneous attempt to explain the legal implications of a collective bargaining agreement, the Commission ruled that such behavior did not indicate insufficient support of the collective bargaining agreement. Town of North Attleborough, 4 MLC 1585 (1977).

Where the selectmen are silent when confronted with opposition to the collective bargaining agreement at a town meeting, their silence does not necessarily indicate insufficient support of the collective bargaining agreement if the totality of their conduct could have been reasonably interpreted as being supportive of the agreement. Town of Billerica, MUP-2873, 4 MLC __(H.O., 1978). Newly elected successor public officials cannot be required to indorse publicly the terms of a collective bargaining agreement negotiated by their predecessors if such indorsement involves the exercise of independent judgment. Labor Relations Commission v. Board of Selectmen of Dracut, SJC, Docket #868, March 14, 1978.

Nothing compels the employer to submit the collective bargaining agreement to any body but the legislature. Where an advisory board or finance committee is not the employer's bargaining representative, that body need not support the contract. Town of Webster, 4 MLC 1543 (1977). Coupled with the statutory duty to request an appropriation (See Section VII below) is the correlative obligation of an employer otherwise to facilitate implementation of the agreement. City of Boston School Committee, 1 MLC 1287 (1975).

8) Unilateral Change

The obligation to bargain in good faith does not cease with the negotiation of an agreement, but continues during administration of the contract. Ayer School Committee, 4 MLC 1027 (H.O., 1977) aff'd, 4 MLC 1478 (1977). Town of Andover, 3 MLC 1710 (1977); City of Chelsea, 3 MLC 1169 (H.O., 1976), aff'd 3 MLC 1384 (1977); City of Boston, 2 MLC 1331 (1976); Worcester School Committee, 2 MLC 1283 (1976).

Included in the duty to bargain is the employer's obligation to negotiate before changing wages, hours, working conditions, or standards of productivity and performance. Lawrence School Committee, 4 MLC 1422 (1977); Town of Wayland, 3 MLC 1724 (1977); Boston School Committee, 3 MLC 1603 (1977); City of Boston, 3 MLC 1450 (1977); Town of North Andover, 1 MLC 1103 (1974).

a.) Notice

The employer must notify the union of potential changes before they are announced so that the bargaining representative has an opportunity to present arguments and proposals concerning the proposed alternatives. City of Boston, 3 MLC 1421 (H.O., 1977); City of Chicopee, 2 MLC 1971 (1975). The duty is not satisfied by presenting the change as a fait accompli and then offering to bargain. City of Everett, 2 MLC 1471 (1976); City of Cambridge, 4 MLC 1620 (H.O., 1977).

b.) Elements of Unilateral Change

The elements of a unilateral change are: 1) pre-existing condition of employment; 2) unilateral alteration; and 3) effect on mandatory subject of bargaining. (See Scope of Bargaining, Mandatory and Non-Mandatory Subjects, under Duty to Bargain, Section VI A. above.) Town of North Andover, 1 MLC 1103 (1974). An employer's good faith in unilaterally altering mandatory subjects of bargaining is irrelevant, as is the fact that the union might not object to the substance of the change. Town of Wayland, 3 MLC 1724 (1977); Town of Natick, 2 MLC 1086 (1975). The maintenance of the status quo applies not only to contractual provisions, but also to long-standing customs and practices, City of Boston, 3 MLC 1450 (1977); City of Everett, 2 MLC 1471 (1976); Town of Marblehead, 1 MLC 1140 (1974); City of Cambridge, 4 MLC 1620 (H.O., 1977); Norwood School Committee, 4 MLC 1467 (H.O., 1977). Cf. City of Worcester, 4 MLC 1317 (H.O., 1977) where a procedure in effect for 1 1/2 years, begun by necessity by new court rules and rescinded when the court rules dissolved, was not a past practice requiring the employer to bargain over the change.

Requiring open sessions for grievance procedure is a unilateral change when past practice has been closed sessions. Ashland Educator's Association, 4 MLC 1251 (H.O., 1977). Where there has been no change in past practice, an employer's transfer of policemen to other departments, not replacing them with other policemen or civilians and not substantially increasing workload of remaining employees, is not a violation, Boston Police Department, 4 MLC 1153 (1977).

In an impasse situation, an employer may implement a unilateral change in a subject matter under negotiation only if the change is consistent with the bargaining position previously communicated to the union, the employer has not engaged in any bad faith bargaining, there is no effort to undermine the status of the union as bargaining agent, and the employers remains willing to fulfill its bargaining obligations. Blue Hills Regional School District Committee, 3 MLC 1613 (1977); City of Boston, 3 MLC 1450 (1977).

An employer must bargain over the reassignment of non-unit personnel which has the effect of displacing bargaining unit members. However, it is not a unilateral change to use civilians within the police department in bureaus where there was a history of the use of civilians and there was no calculated displacement of unit members. City of Boston Police Department, 4 MLC 1153 (1977); City of Boston, MUP-2690, 4 MLC (H.O., 1978).

Mere reiteration of a previously existing policy which has not required strict enforcement in the past may not constitute a unilateral change. Town of Arlington, 2 MLC 1266 (H.O., 1975), reversed in part on other grounds, 4 MLC 1296 (1977); City of Worcester, 4 MLC 1317 (H.O., 1977). Also, there was no violation where an employer attempted to enforce existing rules more effectively and there was no resulting substantial and significant change in past practice. City of Leominister, 3 MLC 1579 (1977); nor was there a violation where a mere change in the mechanics of employee evaluation did not change the standards for evaluation. City of Worcester, 4 MLC 1317 (H.O., 1977). The introduction of a written employee evaluation form, without imposition of new standards of performance, is an acceptable change in supervisory technique. Town of Arlington, 4 MLC 1614 (H.O., 1977).

c.) Waiver of Right to Bargain

If a union fails to object to a unilateral change in a timely fashion, it may waive its right to bargain about the matter. City of Lowell, 3 MLC 1001 (1976); Town of North Andover, 1 MLC 1103 (1974); Revere School Committee, 4 MLC 1187 (1977); Boston School Committee, 4 MLC 1324 (H.O., 1977). A waiver must, however, be knowing, conscious, and unequivocal. Melrose School Committee, 3 MLC 1299 (1976). A broad management rights clause is not an effective waiver. City of Boston, 3 MLC 1450 (1977); Town of North Andover, 1 MLC 1103 (1974); City of Everett, 2 MLC 1471 (1976). Neither would a "zipper clause" allow a unilateral change unless the bargaining history of the parties shows that the issue involved in the change was specifically discussed and appears in the final contract. City of Cambridge, 4 MLC 1620 (H.O., 1977); Ayer School Committee, 4 MLC 1027 (H.O. aff'd 4 MLC 1418 (1977).

A union which files a complaint with the Commission after protesting a unilateral change is not deemed to have waived the right to bargain merely because it failed to formally request bargaining. City of Everett, 2 MLC 1471 (1976).

A formal bargaining request need not be filed if to do so would be futile. Norwood School Committee, 4 MLC 1467 (H.O., 1977). Nor has the union waived its right because it failed to remedy the unilateral change in subsequent contract negotiations, since the union is entitled to bargain on an issue without being presented with a fait accompli. City of Cambridge, 4 MLC 1620 (H.O., 1977). The filing of a grievance by the union is adequate notice of the union's desire to negotiate. Lawrence School Committee, 4 MLC 1422 (H.O., 1977).

VII. Collective Bargaining Agreement; Writing Requirement; Terms; Requests For Appropriations

Section 7(a) of the Law provides that agreements must be reduced to writing and may not exceed a term of three years. An agreement which automatically continues beyond three years unless either party proposes to change it does not violate Section 7. By not proposing changes the parties are, in effect, agreeing to a new contract. Town of Burlington, 3 MLC 1440 (1977).

Within 30 days after an agreement is executed, the employer is required by Section 7 of the Law to submit to the appropriate legislative body a request for an appropriation necessary to fund the contractual cost items. If the legislative body rejects the request, the cost items shall be returned to the parties for further bargaining. Town of Franklin, 1 MLC 1026 (1974). Special statutory provisions are in effect for employers and the Governor when the employer is a board of trustees of community colleges, state colleges, state universities, the judiciary or the State Lottery Commission. See Section 7(c) of the Law.

VIII. Final And Binding Arbitration

A. Threshold Questions

Section 8 of the Law states that parties may include in a written agreement a grievance procedure culminating in binding arbitration. If there is no binding grievance arbitration by agreement, it may be ordered by the Commission under Section 8 of the Law.

When requested to do so by an employer or employee organization, the Commission may order binding grievance arbitration upon finding two threshold facts. First, the parties must have executed a written agreement which does not provide for the resolution of grievances through binding arbitration. Second, there must be a dispute concerning the interpretation or application of the written agreement. Easthampton School Committee, 4 MLC 1598 (1977); Town of Shrewsbury, 4 MLC 1441 (1977); Town of Wayland, 3 MLC 1367 (1977); Town of Athol, 4 MLC 1132 (1977).

In contrast, where the parties have agreed contractually on binding arbitration of the dispute in question an order under Section 8 of the Law is not appropriate. Town of East Longmeadow, 3 MLC 1046 (1976). In that case, the party seeking to enforce the contractual arbitration provision should proceed in Superior Court pursuant to G.L. Chapter 150C. See Town of Danvers, 1 MLC 1231 (1974).

A Section 8 order is appropriate even though the collective bargaining agreement has expired subsequent to the grievance. Board of Trustees of State Colleges (Worcester State College), 1 MLC 1474 (1975). But where there is no written contract in effect at the time of the alleged contract breach, a Section 8 order will not issue. Town of East Longmeadow, 3 MLC 1046 (1976).

If an employee elects to arbitrate a grievance involving suspension, dismissal, removal or termination, arbitration is the exclusive procedure available to the employee. Where, however, the grievance does not involve one of those issues, an employee organization may obtain a Section 8 order even though the aggrieved employee is pursuing alternative remedies. Board of Trustees of State Colleges (Worcester State College), 1 MLC 1474 (1975). See also Town of Wayland, 3 MLC 1367 (1977).

When it receives a request for binding arbitration, the Commission does not itself interpret the collective bargaining agreement. The Commission will order arbitration so long as the dispute is "arguably arbitrable". Town of Shrewsbury, 4 MLC 1441 (1977); Board of Trustees of State Colleges (Worcester State College), 1 MLC 1474 (1974). Where no arbitrator could reasonably concur with the petitioner's position, however, the Commission will not order futile arbitration. Sturbridge School Committee, 1 MLC 1381 (1975).

B. Procedure

Upon receipt of a request for binding arbitration, the Commission notifies all interested parties. A period of ten days from receipt of the notification is allowed for an opposing party to set forth in writing any objections to the request. If the party fails to submit objections and the Commission determines that an order for binding arbitration should issue, such orders will not provide for a show-cause hearing. If objections to the request for binding arbitration are timely filed, the Commission shall determine on a case-by-case basis whether an order for binding arbitration will issue and, if an order issues, whether it will provide for a show cause hearing. Board of Trustees of State Colleges (Fitchburg State College), 2 MLC 1344 (1976).

Section 8 proceedings are administrative rather than adjudicatory, and arguments based on burden of proof are inappropriate. If a Section 8 application is in proper form and appears regular, the order will issue. Board of Trustees (Fitchburg State College), 2 MLC 1344 (1976).

C. Refusal to Participate or Comply with Award

Under sections 10(a)(6) and 10(b)(3), it is a prohibited practice for employers or employee organizations to refuse to participate in good faith in the grievance procedure agreed to by the parties or arbitration ordered by the Commission. The continued refusal by a public employer to comply with the procedural grievance arbitration provisions of a duly executed contract constitutes a per se violation of its duty to participate in good faith in those procedures. City of Chelsea, 3 MLC 1168 (H.O., 1976) aff'd 3 MLC 1384 (1977).

Where an employer refuses to comply with an arbitrator's unambiguous award and forces other employees to file parallel grievances, the employer violates Section 10(a)(6) of the Law. The employer may contend in good faith, however, that the fact situation in the second grievance is not covered by the earlier award. City of Boston, 2 MLC 1331 (1976).

D. Waiver

An employee organization may, with regard to a specific and narrow class of disputes, expressly waive its Section 8 right to request binding arbitration. Worcester School Committee, 2 MLC 1174 (1975). The waiver must be clear and unmistakable. The absence of a provision for binding arbitration in the collective bargaining agreement does not constitute a waiver of the right to a Section 8 order. Town of Athol, 4 MLC 1137 (1977).

The filing of a prohibited practice charge does not in itself signify waiver. Issues as to whether arbitration has been foreclosed due to procedural deficiencies in the claim are left to resolution by the arbitrator. Town of Shrewsbury, 4 MLC 1441 (1977).

IX. Impasse Procedures

Section 9 establishes a mechanism for the resolution of bargaining impasses through mediation, fact-finding, and voluntary interest arbitration. Under sections 10(a)(6) and 10(b)(3), it is a prohibited practice to refuse to participate in good faith in the statutory impasse procedures. "Last best offer" arbitration for police and fire fighters is covered by Chapter 347 of the Acts of 1977.

The consistent failure of a party to attend mediation sessions after receiving timely notice of such meetings constitutes a per se violation of the Law. Town of Rockland, 3 MLC 1359 (H.O., 1977). Entering mediation with the intent to bargain anew on all items to be negotiated, including those for which previous agreement existed, is evidence of a lack of good faith. Middlesex County Commissioners, 3 MLC 1594 (1977).

The withdrawal of an improved offer prior to fact-finding and retreat to a less favorable position is evidence of bad faith. Town of Saugus, 2 MLC 1480 (1976). In police and fire fighter cases, insistence on submission to the fact-finder of non-mandatory subjects of bargaining is, absent consent of the other party, a breach of the duty to participate in good faith in fact-finding. Local 1099, International Association of Fire Fighters, 2 MLC 1238 (1975). Egregious misrepresentation of facts to the fact-finder may constitute a prohibited practice. Factors which may militate against such a finding include: complexity of the issues; commission of a similar error by the complaining party; opportunity for rebuttal; and absence of reliance by the fact-finder upon the misrepresentation. Local 1099, International Association of Fire Fighters, 2 MLC 1238 (1975).

The fact-finding procedure should be a fluid one inasmuch as it is designed to encourage settlement. Therefore, mere alteration of proposals during the fact-finding process is not a prohibited practice. Local 1099, International Association of Fire Fighters, 2 MLC 1238 (1975). Neither is it a breach of duty to participate in good faith to release information to the media, at its request, if the release neither frustrates fact-finding nor contributes significantly to a deadlock of negotiations. Local 1099, IAFF, 2 MLC 1238 (1975). This assumes, of course, that the parties had not established ground rules concerning news releases during negotiations. Town of Maynard, 2 MLC 1141 (H.O., 1975) aff'd 2 MLC 1281 (1976).

Neither party to an impasse is under an obligation to use the statutory impasse mechanisms. Should a party decline to use the procedures, however, it cannot indefinitely refuse to resume negotiations on the ground of impasse. Rather, there is a duty to resume bargaining when presented with a good faith request to do so. Lawrence School Committee, 3 MLC 1304 (1976).

IX-A Strikes

Section 9A(a) prohibits public employees and employee organizations from striking or inducing or encouraging work stoppages by public employees. Under MLRC Rule 16.__ when a strike occurs or is about to occur a public employer may petition for a strike investigation. The employer must also serve a copy of the petition on an officer or representative of the employee organization and file an affidavit of service with the Commission. The petition must identify the parties allegedly in violation of Section 9A(a), and must contain certain other information needed by the Commission to carry out an investigation. Upon receipt of a proper petition, the Commission gives notice by telegram or other prompt means to interested parties. Pursuant to this notice, the Commission holds an investigatory proceeding at its offices. This proceeding is usually held within a day of the filing of the petition.

While the formal presentation of sworn testimony is often not necessary at the investigation, the petition must present facts sufficient for the Commission to conclude that a violation of Section 9A(a) has occurred. Alliance, AFSCME/SEIU, AFL-CIO, SI-29 (1976). Where material facts are disputed, the Commission agent may call for sworn testimony. See Taunton Municipal Lighting Plant Commission, 3 MLC 1153 (1976).

The statute prohibits two types of conduct. First, no public employee or employee organization shall engage in a strike. See Commonwealth of Massachusetts, SI-29 (1976) and the other cases cited herein where public employees refused to report to work. However, where an existing collective bargaining agreement specifically authorizes employees to refuse to work overtime, such refusal is not a strike within the definition of that term in section 1 of the Law. In City of Beverly, 3 MLC 1229 (1976) the Commission found no violation of section 9A(a) when police officers refused overtime and their collective bargaining agreement specified that overtime was voluntary and the refused overtime was non-emergency in nature. Where overtime is required by contract or is emergency in nature, concerted refusal to work such overtime constitutes a violation of section 9A(a). Town of Arlington, 3 MLC 1276 (1976); City of Medford, SI-43 (1976).

The second aspect of section 9A(a) prohibits public employees or employee organizations from inducing, encouraging or condoning a strike. The Commission has required evidence that the union was participating in the strike. Southeastern Regional School District, SI-54 (1977).

Recently, however, the Supreme Judicial Court held that union officials have an affirmative duty to oppose a strike and to insure union compliance with an injunction. Labor Relations Commission v. BTU Local 66, 1977 Mass. Adv. Sh. 2738, 371 N.E. 2d 761. The union's participation in picketing or demonstrations during a work stoppage is evidence of inducing and encouraging a strike. City of Chelsea, SI-33 (1976); City of Newton, SI-26 (1976). The union will be held responsible for the actions of its officers and leaders. Franklin School Committee, SI-56 (1977). The Commission may infer union inducement and condonation where the work stoppage was 90 per cent effective, union officers failed to appear for work, and the strike "started and stopped on cue, clearly indicating organization and direction", all of which occurred during a period of labor unrest. City of New Bedford, 4 MLC 1001 (1977). Refusals to work in sympathy with other employees engaged in a strike is a violation of the Law. City of Newton, SI-27 (1976); University of Massachusetts Medical School, SI-30 (1976).

If it concludes that a violation of Section 9A(a) has occurred, the Commission will issue an interim order directing the end of the work stoppage. The Commission's interim order may also address some of the issues underlying the work stoppage, especially where related prohibited practice charges are involved, and require the parties to participate in accelerated bargaining, mediation, or factfinding. Commonwealth of Massachusetts, SI-29 (1976), (bargaining and mediation); Southeastern Regional School District, SI-54 (1977), (expedited factfinding). The Commission, in the absence of prohibited labor practices, lacks the authority to order binding arbitration of the dispute. Director, Division of Employee Relations v. Labor Relations Commission, 1976 Mass. Adv. Sh. 1045, 346 N.E. 2d 852.

X. Prohibited Practices

A. Employer Prohibited Practices

1) Section 10(a)(1) makes it unlawful to interfere with, restrain or coerce an employee in the exercise of any right under the Law. Since the typical Section 10(a)(1) violation occurs when an employee's rights under Section 2 are infringed, the reader is referred to the discussion in part II of this Summary. Additionally, Section 10(a)(1) violations arise in the refusal to bargain context since an employer's failure to negotiate in good faith interferes with, restrains and coerces employees in their right to bargain collectively through their chosen representatives. (See part

VI, above. Surveillance of union activities is sufficient interference to constitute a violation of Section 10(a)(1). Plymouth County House of Correction, 4 MLC 1555 (1977).

Any action against an employee in retaliation for filing a grievance under the collective bargaining agreement is a violation of Section 10(a)(1), since the filing of grievances is a protected union activity. It is no defense to the employer that the employee's grievance was factually incorrect. City of Worcester, 4 MLC 1684 (H.O., 1977).

2) Section 10(a)(2) makes it a prohibited practice to dominate, interfere or assist in the formation, existence or administration of any employee organization. To enter a stipulation with a challenging union that the incumbent's contract would be continued while the challenger's decertification petition was pending was a prohibited practice, even when executed in the interest of maintaining labor stability. City of Worcester, 1 MLC 1265 (1975). An employer was found to be in violation of Section 10(a)(2) where it refused to bargain over certain subjects with a union representing one unit of employees, but bargained over the same subjects with a different union representing another unit of employees. Town of Natick, 2 MLC 1149 (H.O., 1975).

3) Section 10(a)(3) provides that an employer may not discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization. This provision extends to all concerted, protected activity. Town of Somerset, 3 MLC 1618 (1977). The employer's motivation is key and an employer's action will be viewed as discriminatory if it is motivated either in whole or in part by an employee's protected activity. Commonwealth of Massachusetts (Mass. Rehabilitation Commission), 2 MLC 1400 (1976); Ronald J. Murphy, 1 MLC 1271 (1975).

The burden of establishing a violation by a preponderance of the evidence rests upon the charging party. Town of Dennis, 3 MLC 1014 (1976); Minuteman Regional School District, 2 MLC 1435 (1976). In order to establish a prima facie case, the charging party must offer evidence tending to prove the following essential elements: union or other protected activity; employer knowledge of the activity; adverse action taken by the employer; employer motivation to penalize or discourage union activity, Town of Somerset, 3 MLC 1618 (1977); County of Worcester, 3 MLC 1154 (1976); Town of Tewksbury, 2 MLC 1158 (1975); Town of Sharon, 2 MLC 1205 (H.O., 1975).

Employer knowledge of union activity may be inferred from the surrounding circumstances, particularly where the "small plant doctrine" can be applied. Plymouth County House of Correction and Jail, 4 MLC 1555 (1977).

The burden of establishing improper motivation can be satisfied by circumstantial evidence and the reasonable inferences drawn therefrom. Town of Somerset, 3 MLC 1618 (1977); Town of Sharon, 2 MLC 1205 (H.O., 1975); Harwich School Committee, 2 MLC 1095 (1975). Factors considered in determining the existence of improper motivation include: timing of the discharge coincidentally with the protected activity, Ronald J. Murphy, 1 MLC 1271 (1975); Town of Somerset, 3 MLC 1618 (1977); visibility of the employee in his or her support of the union, Town of Wareham, 3 MLC 1334 (1976); abruptness of the discharge and the employer's general hostility toward the union or toward concerted activity, Ronald J. Murphy,

1 MLC 1271 (1975); Town of Halifax, 1 MLC 1486 (1975); the employer's anti-union remarks, inconsistent or shifting reasons for the discharge or other discipline, Town of Hopkinton, 4 MLC 1072 (H.O., 1977), aff'd 4 MLC ___ (1978); St. Elizabeth's Hospital v. Labor Relations Commission, 321 N.E.2d 837, 1 MLC 1248 (1975); sudden resurrection of previously condoned transgressions, Town of Hopkinton, 4 MLC 1072 (H.O., 1977), Mt. Wachusett Community College, 1 MLC 1496 1975); staleness of charges, Town of Somerset, 3 MLC 1618 (1977); surveillance and compilation of information concerning the employee, Town of Sharon, 2 MLC 1205 (H.O., 1975); comparative treatment and triviality of reasons for discharge, Town of Hopkinton, 4 MLC 1072 (H.O., 1977) aff'd 4 MLC __ (1978); Town of Wareham, 3 MLC 1334 (1976); 3 MLC 1334 (1976); departure from established procedures for disciplinary action, Town of Somerset, 3 MLC 1618 (1977); failure to warn the employee prior to discharge or other disciplinary action Town of Somerset, 3 MLC 1618(1977); explicit or inferred hostility and threatening behavior towards employees who have filed grievances, Department of Public Safety, 4 MLC 1110 (H.O., 1977), see generally City of Fitchburg, 2 MLC 1123 (1975); Harwich School Committee, 2 MLC 1095 (1975). However, the mere coincidence in time between the employee's union activities and his or her discharge is not sufficient to raise an inference of knowledge on the part of the employer of the employee's union activity. Lexington Taxi Corp., 4 MLC 1677 (1978).

While pro-union concerted activities will not insulate an employee from discharge for "cause", it is well-settled that the existence of "cause" for the employer's action does not justify it where the preponderence of the evidence demonstrates that anti-union considerations were involved. Town of Halifax, 1 MLC 1486 (1975); Town of Wareham, 2 MLC 1547 (1976). In the absence of proof of improper motive the Commission will not question the personnel policies and practices of a public employer. Town of Tewksbury, 2 MLC 1158 (1975); Danvers School Committee, 4 MLC 1530 (1977).

The inference that one employee is unlawfully discharged is not necessarily rebutted by evidence that the employer did not discriminate against another employee who is also actively engaged in protected activity. Town of Halifax, 1 MLC 1486 (1975). It is not discriminatory for an employer to transfer an employee to another shift to permit the employee to perform a more skilled job commensurate with his or her skills. County of Worcester, 3 MLC 1154 (1976). Termination of employees under a comparative rating system was held to be lawful even though the employees were active in union affairs, where there was an absence of discrimination in the rating process. Town of Dennis, 3 MLC 1014 (1976). A Section 10(a)(3) violation has been found, however, when an employer conditioned promotion on an employee's non-union status. Town of Swansea, 3 MLC 1484 (1977).

4) Section 10(a)(4) makes it a prohibited practice for a public employer to discharge or otherwise discriminate against an employee because he or she has signed or filed an affidavit, petition or complaint, given testimony under the Law, or formed, joined or chosen to be represented by an employee organization. City of Boston, 4 MLC 1033 (1977). In Town of Wareham, 3 MLC 1334 (1976), the Board of Sewer Commissioners was held to be in violation of Section 10(a)(4) for discharging one employee upon his stated intention of pursuing redress of his grievances and another for giving testimony at the Commission.

The Commission considers the protection of Section 10(a)(4) so critical to its ability to investigate complaints and keep channels of information open that its protection has been interpreted to extend to employees not defined and covered by Section 1 as well as those employees covered by Section 1. Michael J. Curley, 4 MLC 1124 (1977).

5) Section 10(a)(5) provides that it is a prohibited practice for an employer to refuse to bargain in good faith as required in Section 6. This duty to bargain in good faith is discussed under Section VI above. Section 10(a)(6) requires that employers participate in good faith mediation, fact-finding, and arbitration. It is discussed in Sections VIII and IX above.

B. Union Prohibited Practices

1) Section 10(b)(1), the union counterpart of Section 10(a)(1), makes it a prohibited practice for an employee organization to interfere with, restrain, or coerce any employer or employee in the exercise of any right guaranteed under the Law. Section 10(b)(1), in relation to Section 5, makes it a prohibited practice for a union to fail to represent the interests of all employees in the bargaining unit without discrimination and without regard to union membership. See Section V above; Local 342, International Brotherhood of Police Officers, 2 MLC 1186 (1975).

2) Under Section 10(b)(2) it is a prohibited practice for a union to refuse to bargain in good faith. See Section VI above; Local 841, International Association of Firefighters, 3 MLC 1378 (1977); Local 195, Independent Public Employees Association, 3 MLC 1587 (H.O., 1977); Town of Andover, 4 MLC 1081 (1977). Where the Board of Selectmen suggest that the union petition the town meeting for an increase in insurance benefits, the union did not bargain in bad faith when it presented its position directly to the town meeting. Town of Leicester, 4 MLC 1264 (H.O., 1977), aff'd 4 MLC 1666 (1977); Leicester Police Association, 4 MLC 1261 (1977).

3) Section 10(b)(3) is the corollary to the Section 10(a)(6) requirement of good faith participation in mediation, fact-finding, and arbitration. See Sections VIII and IX above.

XI. Commission Procedures and Remedial Authority

Section 11 of the Law and MLRC Rule 15.00 delineate Commission procedures and remedial authority in prohibited practice cases. Section 4 of the Law and MLRC Rule 14.00 govern the procedure in representation cases.

A. Procedures

MLRC Rule 15.02 establishes a six-month statute of limitations on the filing of prohibited practice charges. A charge must be filed within six months of the alleged violation or within six months from the date the violation became known or should have become known to the charging party. Town of Wayland, 3 MLC 1724 (H.O., 1977). Where a violation is continuing, a charge will not be barred because it is filed more than six months after the initial violation. Local 495, SEIU, 3 MLC 1501 (1977).

1) Charges and Complaints

A charge is the initial written filing a party makes to the Commission. MLRC Rule 11.07. After investigation, the Commission determines whether a hearing is warranted and specifies the allegations in a complaint. The allegations in a charge need not conform to the technical rules of pleading. A charge or complaint is legally sufficient if it enables the respondent to understand the issues raised so that it can prepare its defense. Burlington School Committee, 1 MLC 1179 (1974). Where there are no facts which could support a claim, a hearing is not required and the Commission has allowed a motion for summary judgment. City of Cambridge, 4 MLC 1044 (1977). A party may not litigate in an unfair labor practice proceeding issues previously litigated in a representation proceeding between the same parties.

City of Cambridge, 4 MLC 1055 (1977), nor may a party relitigate representation issues when it has failed to appeal a hearing officer's decision in a representation case. City of Worcester, 4 MLC 1373 (1977).

2) Expedited Hearing

Sections 4 and 11 of the Law provide that a hearing may be designated as an expedited hearing. Designed to relieve the agency's crowded docket, these hearings are conducted by the Commission members or agents and are recorded by tape rather than stenographically. The Commission has redesignated an expedited hearing as a formal hearing upon an uncontested oral motion by a party. Board of Trustees of University of Massachusetts, 2 MLC 1315 (1976).

The Commission's hearing officers are not bound by the technical rules of evidence prevailing in the courts. Rulings made by hearing officers during expedited hearings may not be appealed to the full Commission prior to the conclusion of the case before the hearing officer. Somerville School Committee, 2 MLC 1335 (1976), except under extraordinary circumstances. See MLRC Rule 13.02(4).

3) Review of Hearing Officer's Decision

A hearing officer's decision becomes final and binding unless a review by the Commission is requested within ten (10) days. A party who fails to appeal from a hearing officer's decision cannot raise the same issues between the same parties without changed circumstances when that issue has been fully and fairly litigated before the hearing officer. City of Worcester, 4 MLC 1373 (1977). The Commission has adopted the following procedures for its review of a hearing officer's decision.

> The mere filing of a Notice of Appeal of a Hearing Officer's decision does not entitle the appellant to de novo review of the entire proceedings. If the appellant claims that errors of law were made by the Hearing Officer in reaching his or her decision, the timely filing of an appeal suffices to bring these issues before the Commission. Supplementary statements containing legal arguments on specific points will, of course, facilitate the Commission's deliberations and are always carefully considered.
>
> If the appellant claims that the Hearing Officer erred in fact-finding, however, it must do more than simply file a general appeal to the Commission. In the absence of the parties specifically directing the Commission's attention to alleged incorrect findings of fact, the Commission will accept the Hearing Officer's fact findings and limit its review to the Hearing Officer's conclusions of law. Town of Dedham, 3 MLC 1332 (1976). See also Town of Swansea, 4 MLC 1527 (1977).

The Commission will exercise its discretion to reopen the record only under extraordinary circumstances. Evidence available to the moving party at the time of the original hearing has not been admitted upon such a motion. City of Everett,

2 MLC 1471 (1976). A party's due process rights are not violated because the Commission reviews sound recordings of an Expedited Hearing instead of written records. The recordings must, however, be sufficiently clear to make the testimony of the witnesses intelligible. Town of Sharon, 3 MLC 1052 (1976).

B. Deferral to Arbitration

When a complaint raises issues that were decided or may be decided through fair and regular arbitration proceedings agreed to by the parties, and where the decision is not repugnant to the Law or policy, the Commission will defer to the arbitrator's decision. The Commission's policy is designed to favor arbitration, and to discourage forum shopping and relitigation of issues. This deferral policy will be applied in prohibited practice cases and, where appropriate, in representation cases. Boston School Committee, 1 MLC 1287 (1975); City of Boston, 1 MLC 1229 (1974); Cohasset School Committee, MUP-419 (6/19/73).

Even though evaluative decisions themselves may be within management's non-delegable rights, a school committee's failure to follow the procedures for such evaluation set forth in the collective bargaining agreement has been held to be subject to arbitral enforcement. School Committee of West Springfield v. Korbut, 1977 Mass. Adv. Sh. 2548, 369 N.E.2d 1148.

Where both sides submit non-mandatory bargaining subjects to voluntary interest arbitration, they are bound by the arbitrator's decision which is enforceable in court. However, where educational policy is involved to a significant degree, the issue should be excluded from interest arbitration even if the school committee consents. This determination must be left to a case-by-case resolution. School Committee of Boston v. B.T.U., Local 66, 1977 Mass. Adv. Sh. 2738, 371 N.E.2d 761.

Where arbitration included a decision on a permissive subject and invaded the legitimate management prerogative on employee assignments, that portion of the award was severed and voided from the valid part of the arbitrator's decision. Harpin v. City of Marlborough, Civil Action No. 77-1294, (Middlesex Super. Ct. 8/2/77).

C. Remedial Powers

The Commission has broad powers to order relief if it finds that a prohibited practice has been committed. It may issue cease and desist orders, and it may order reinstatement with full back pay, preservation of records necessary to determine back pay awards, and posting of notices. City of Boston, 1 MLC 1271 (1975).

1) Back Pay Awards

The Commission conducts supplemental proceedings to determine the amount of back pay due to a discharged employee. Back pay is determined by using the following formula: Net back pay= gross back pay - (interim earnings - expenses). In applying this formula, gross pay is to include such items as overtime, bonuses, vacation pay, holiday pay, retirement benefits, insurance benefits and tips. Interim

earnings includes only income attributable to new employment. Seven per cent interest may be added to the back pay award. Plymouth County House of Correction and Jail, 4 MLC 1555 (1977); Lawrence School Committee, 4 MLC 1422 (H.O., 1977). The employee's burden is merely to establish gross pay. The employer must establish interim earnings and other set-offs. The employee must mitigate damages by seeking suitable employment. Town of Townsend, 1 MLC 1450 (H.O., 1975). The Commission may estimate back pay when exact computation is not possible, as long as there is sufficient evidence upon which to base a reasoned conclusion. The employer waives the right to contest any figures if it does not appear at the hearing on this matter. Town of Townsend, 1 MLC 1450 (H.O., 1975).

Where an employee was unlawfully discharged one day before he would become a permanent civil service employee, the Commission ordered the employer to rehire the employee and grant him immediate status as a permanent employee. City of Boston, 3 MLC 1101 (1976). The Commission has also ordered the employer to remove from an unlawfully discharged employee's personnel records any reference to the discharge. City of Boston, 3 MLC 1101 (1976).

2) Bargaining Orders

In cases where there has been a refusal to bargain by either employers or unions the Commission ordinarily issues a bargaining order. Where the full consequences of an employer's refusal to bargain would not be completely remedied by a bargaining order, compensatory relief is appropriate. Middlesex County Commissioners, 3 MLC 1594 (1977).

3) Status Quo Ante

Where the Commission finds that the employer has unilaterally altered wages, hours, terms or conditions of employment, the usual remedy has been to order a return to the status quo ante, along with a bargaining order. Town of Marblehead, 1 MLC 1140(1974); City of Fitchburg, 2 MLC 1123 (1976). The Commission has also issued a make whole order directing a city to compensate fire fighters at the rate of ten per cent of their ordinary wages for the hours they were required to perform floor patrol under an unlawful unilaterally instituted change in working conditions. City of Everett, 2 MLC 1471 (1975).

The Commission has ordered an employer to extend to unit employees the benefits contained in proposals that had been initialed by both negotiators and later repudiated by the employer when the parties failed to agree upon other items. Middlesex County Commissioners, 3 MLC 1594 (1977). Similarly, where an employer violated Section 10(a)(5) by withdrawing a tentative agreement after the union has already made concessions to reach that agreement, a hearing officer ordered the employer to return to the bargaining table on the basis of the status quo before the tentative agreement was withdrawn by the employer. Spencer-East Brookfield Regional School Committee, 3 MLC 1400 (H.O., 1977). In Boston School Committee, 1 MLC 1287 (1975), the employer was ordered to pay to the union the dues and agency service fees that normally would have accrued to the union absent the employer's unlawful refusal to bargain. In an analogous situation, a union was ordered to return to a unit employee, if she tendered her resignation from the union, the dues she had paid after she had been unlawfully coerced to join the union, Local 285, SEIU, 3 MLC 1646 (1977). An employer has been directed to compensate an employee organization for the union dues which would have been deducted if unlawfully discharged employees had remained on the payroll. Plymouth County House of Correction and Jail, 4 MLC 1555 (1977). The employer was similarly required to reimburse the dischargees for "out of pocket" expenses incurred during the litigation. Plymouth County, supra.

4) Other Forms of Relief

Recently, a hearing officer's order of affirmative relief included a requirement that the mayor introduce an amendment to cure a local ordinance which was the focus of the employer's bad faith conduct. The Commission affirmed the order, noting that the remedy did not force the employer to accept any substantive contract terms, but merely required the mayor to make a proposal before the local law-making body. City of Springfield, 4 MLC 1134 (H.O., 1977); aff'd 4 MLC 1517 (1977).

XII. Agency Service Fee

Section 12 of the Law provides that public employees may be charged an agency fee as a condition of employment if the fee is required by a negotiated collective bargaining agreement ratified by a vote open to all members of the bargaining unit. The fee must be proportional to the costs of negotiating and administering the collective bargaining agreement. The Commission has adopted regulations requiring financial disclosure by unions charging an agency service fee to non-members and mandating that notice be given to all employees of votes to ratify agency fee agreements. Non-members may not be required to defray expenses for political or charitable contributions; social activities; educational programs unrelated to collective bargaining; fines or penalties assessed for illegal activities; organizing costs; or for health insurance, retirement or pension benefits. MLRC Rules 17.01 to .05. Gloucester Teachers Association, 4 MLC 1548 (H.O., 1977). The effect of c.903 of the Acts of 1977 (modifying Section 12 of the Law) on the Commission's Rules has not been determined.

CHART 1

HOW DID PUBLIC EMPLOYEE BARGAINING EVOLVE?

1935 Wagner Act (National Labor Relations Act)
Gave collective bargaining rights to private sector employees in interstate commerce.

1937 Massachusetts passes Chapter 150A, "Baby Wagner Act," extending bargaining rights to private sector employees within the commonwealth; Labor Relations Commission established.

1958 All public employees (except police officers) granted the right to join unions and to "present proposals" to public employers. Chapter 149, Section 178D.

1960 Employees of city or town could bargain provided that the law was accepted by the city or town. There were no specific procedures for elections nor the matter and method of bargaining Chapter 40, Section 4C.

1964 State employees given the right to bargain with respect to working conditions (but not wages). Chapter 149, Section 178F. However, it was not until 1965 when the Director of Personnel and Standardization promulgated the rules governing recognition of employee organizations and collective negotiations that bargaining took place.

1965 Municipal employees given the right to bargain about wages, hours, and terms and conditions of employment. Chapter 149, Sections 178G-N. This repealed Chapter 40, Section 4C.

1969 Mendonca Commission established by legislature to revise public employee bargaining laws.

1973 All public employees--state and municipal--extended full bargaining rights under comprehensive new statute, Chapter 150E; binding arbitration of interest disputes involving police and fire employees.

1974 Chapter 150E amended to strengthen enforcement powers of Labor Relations Commission; modify union unfair labor practices; modify standards for exclusion of managerial employees.

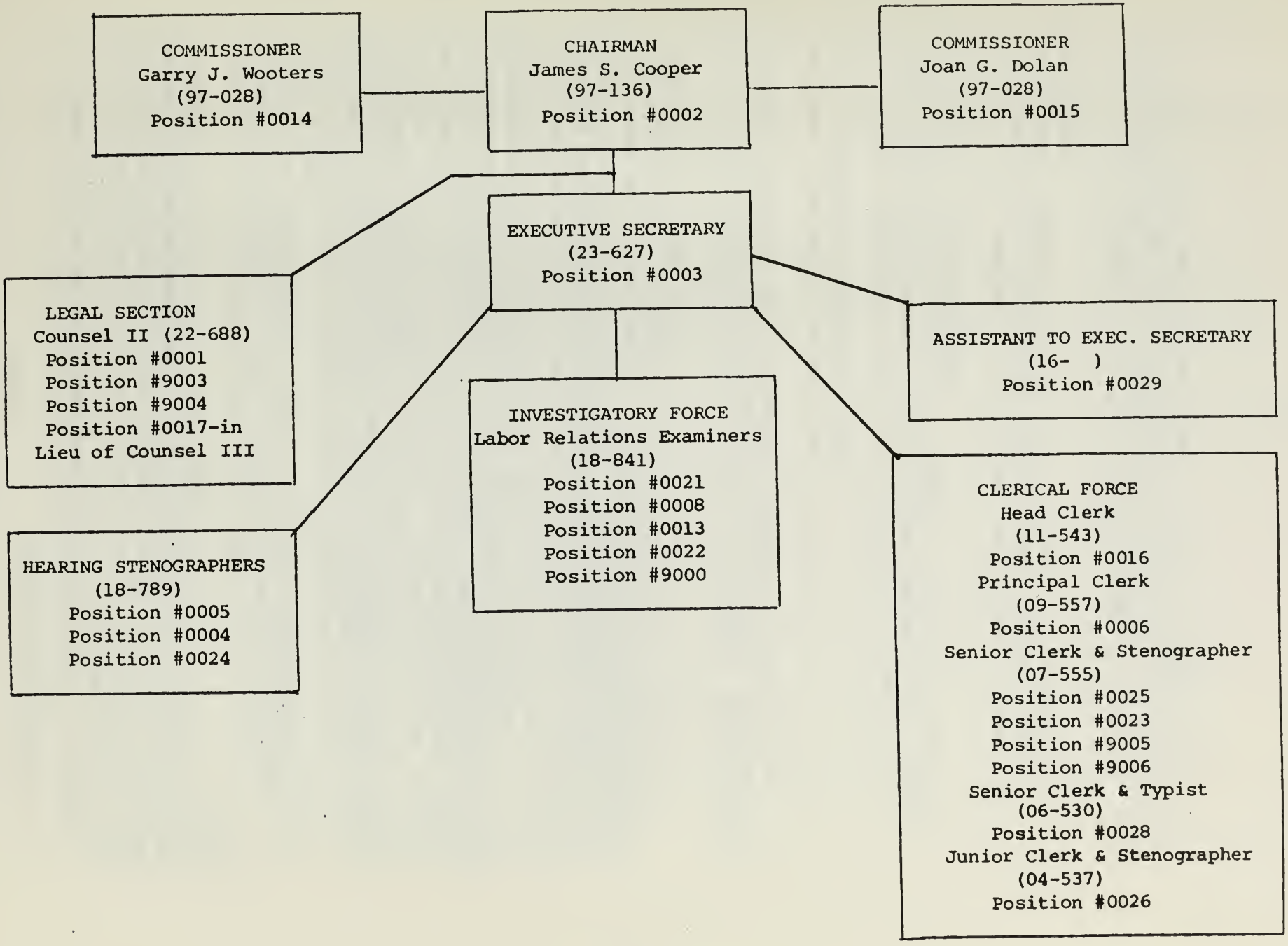
1975 MLRC issued standards for Appropriate Bargaining Units affecting fifty five thousand state employees in more than two thousand job classifications. Ten statewide units were created - five non-professional and five professional.

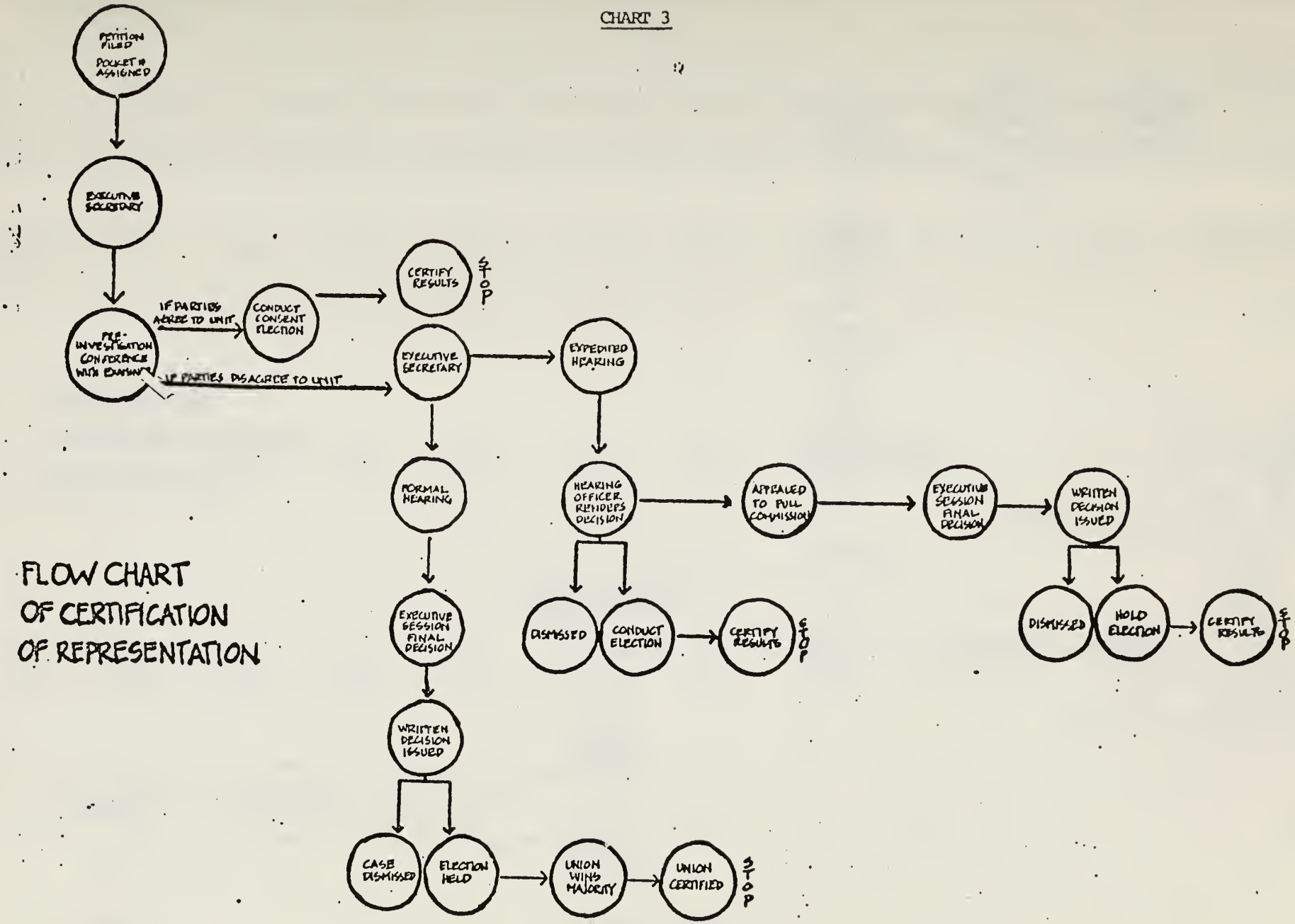
CHART 2

COMMONWEALTH OF MASSACHUSETTS

(Present Structure as of July 18, 197

LABOR RELATIONS COMMISSION





FLOW CHART OF CERTIFICATION OF REPRESENTATION

FLOW CHART OF PROHIBITED PRACTICE COMPLAINTS

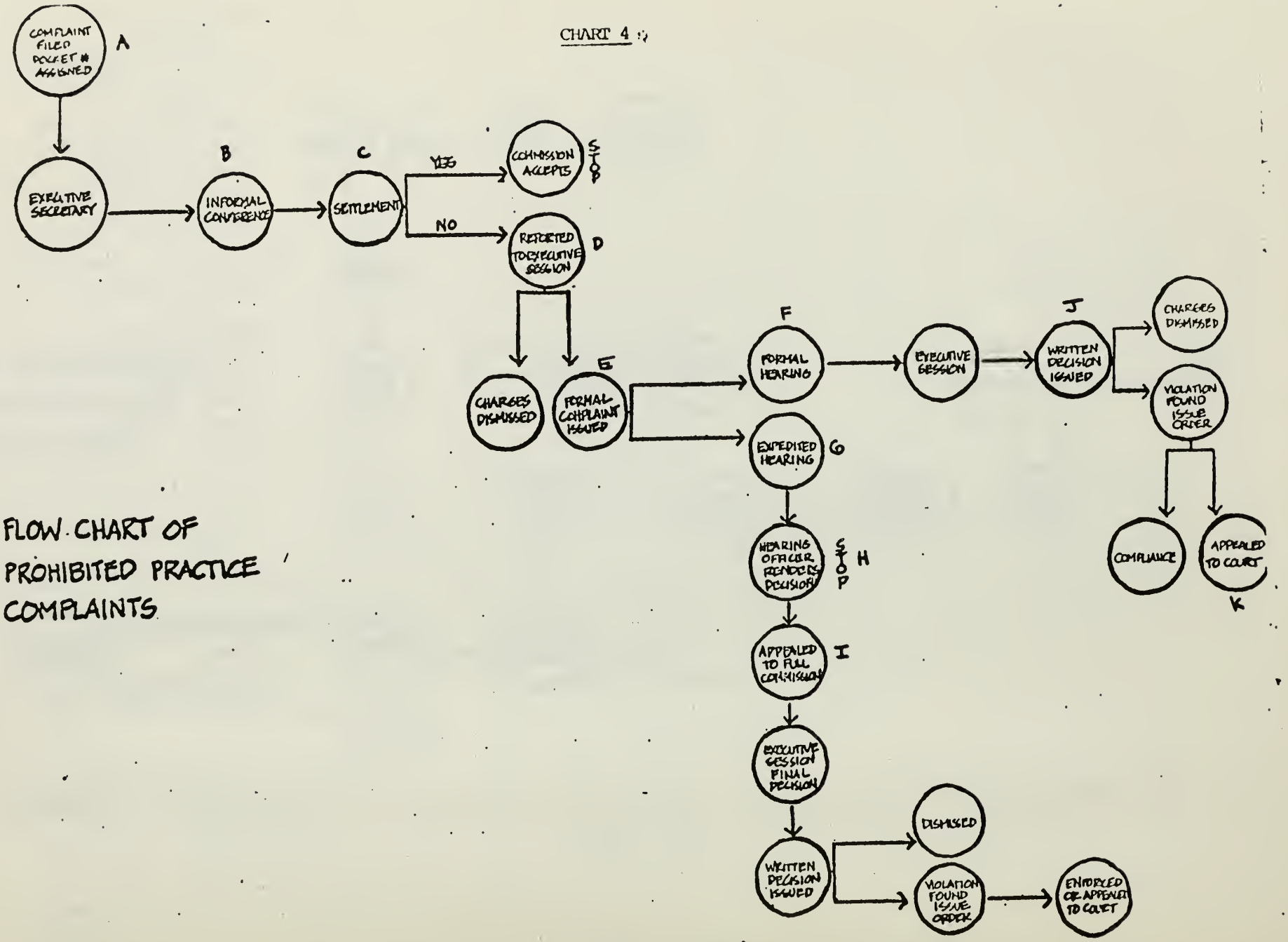


TABLE 1

TOTAL FILINGS

YEAR	78	77	76	75*	74*	73	72	71	66
Representation Cases									
(TOTAL)	231	249	304	400	297	287	299	201	144
Public	207	228	272	379	229	238	245	167	78
Private	24	21	32	21	68	49	54	34	66
Prohibited Practice Cases									
(TOTAL)	554	426	390	398	276	277	177	110	
Public	516	393	350	375	233	244	137	94	
Private	38	33	40	23	43	33	40	16	
Other**	83	26	42	17					
GRAND TOTAL	868	701	736	815	573	564	476	311	144

*Note: A moratorium on the processing of most state representation petitions was declared Ocotober 10, 1974-March 3, 1975 and a moratorium for all petitions took place in May-July 1, 1974.

**Strikes investigations and requests for binding arbitration and clarification of bargaining unit petitions.

TABLE 2

BREAKDOWN OF TOTAL FILINGS

CODE	MEANING	78	77	76
MCR:	Petition by or on behalf of Municipal Employees seeking certification or decertification of an Employee Organization.	195	156	194
CR:	Petition by or on behalf of Private Employees seeking certification or decertification of an Employee Organization.	24	21	32
SCR:	Petition by or on behalf of Employees of the Commonwealth seeking certification or decertification of an Employee Organization	12	10	10
MCRE:	Municipal Employer seeks to resolve claim of representation by one or more Employee Organizations.	-	-	1
CAS:	Employee Organization or Employer seeks clarification or amendment of recognized or certified bargaining unit.	63	62	64
MUP:	Complaint filed by employee organization against Municipal Employer.	319	256	257
UP:	Complaint filed by employee organization against Private Employer.	32	32	32
MUPL:	Complaint filed by Municipal Employer or an individual against employee organization.	61	78	48
UPL:	Complaint filed by Private Employer against employee organization.	6	1	8
SUP:	Complaint filed by employee organization against the Commonwealth.	84	44	31
SUPL:	Complaint filed by the Commonwealth against an employee organization.	52	15	14
SI:	Petition filed by Employer requesting the Commission to investigate strike or strike threat by employees.	11	18	24
RBA:	Employer or employee organization requests the Commission to order Binding Arbitration.	9	8	17
TOTAL		868	701	732

TABLE 3

ELECTIONS

	FY 78	FY 77	FY 76	FY 75	FY 74	FY 73	FY 72	FY 71
Total Elections	163	173	185	180	169	233	188	122

DECISIONS

	1978	1977
Hearing Officer	121	96
Commission	95	71
TOTAL	216	167

TABLE 4

TOTAL HEARINGS

	FY 78	FY 77	FY 76
Formal	119	114	96
Expedited	263	293	208
Informal	558	648	642
Other	47	35	27
Grand Total	987	1,090	973

TABLE 5

CASE	EMPLOYER	UNION	WORK STOPPAGE	COMMISSION ACTION
SI 52 7/1/77	Town of Barnstable	Local 59, Teamsters, Chauffeurs, Warehousemen and Helpers of America	yes	Interim order-cease & desist complied with
SI 53 7/6/77	Town of Walpole	Local 1957, AFSCME	yes	hearing held-waiting to report to full Commission
SI 54 9/6/77	Southeastern Regional School District Committee	Local 1849, Southeastern Regional Teachers Federation	yes	Interim order-cease & desist and bargaining. Court enforcement strike settled with deal for expedited factfinding.
SI 55 9/8/77	City of Newton	AFSCME	no	--settled--
SI 56 9/16/77	Franklin School Committee	Franklin Education Association Massachusetts Teachers Association	yes	Interim order, injunction contempts-contract settled $155,000 fines paid.
SI 57 10/12/77	Town of Weymouth	Local 1395, AFSCME	yes	ordered to cease & desist
SI 58 3/6/78	Old Colony Reg. School District	Local 59, Teamsters	alleged	--dismissed--
SI 59 3/6/78	"	"	"	"
SI 60 3/9/78	City of Chelsea	Local 937, I.A.F.F.	no	--dismissed--
SI 61 3/31/78	City of Boston	Local 944, AFSCME	no	--deferred--
SI 62 6/6/78	Town of Rockland	Local 1700, AFSCME	no	--deferred--

APPENDIX A

Commission decision highlights

1) November 1977 The Commission ordered reinstatement and back pay plus 7% interest to four correction officers fired illegally by the Plymouth County Sheriff in 1975. The officers were fired, the Commission found, in an attempt to intimidate other employees from exercising their right to participate in union activities.

2) November 1, 1977 In a decision issued by the Commission concerning the Lawrence School Committee and the Lawrence School Department Clerical Employees Association, interest on back pay awards were increased from 6% to 7%.

3) April 1978 The Commission found that the Commonwealth of Massachusett committed an unfair labor practice when it made unilateral payroll deductions from state employees' payroll checks to recoup losses from an overpayment made by the Group Insurance Commission without prior bargaining with Alliance, AFSCME-SEIU, AFL-CIO.

4) April 27, 1978 In City of Boston School Committee and Administrative Guild, the Commission issued a decision that dealt with the complex issue of waiver by inaction.

5) June 2, 1978 The Commission ordered the Newton School Committee to offer reinstatement and back pay plus 7% interest to seven custodians who were laid off in July 1976. The Commission ruled that the School Committee had not bargained sufficiently with the Newton School Custodians Association over mandatory subjects of bargaining. Such issues as the criteria for the specific layoffs, recall and rehire rights, continued seniority, and severance pay were mandatory subjects of bargaining. The decision was significant because of the way it dealt with the complex issue of mandatory subjects of bargaining.

Higher Court Affirmations of Commission Decisions

1) Cambridge City Hospital house officers (interns, fellows and residents are defined as employees and therefore covered by G.L.c.150E. Superior Court concurs.

2) Supreme Judicial Court affirms Commission interpretation of "managerial employee. The Wellesley School Committee refused to bargain with a group of employees it considered managerial. The Commission, by its interpretation, found that the employees were not managerial and found that the School Committee violated G.L.c.150E by refusing to bargain. The SJC affirmed completely the Commission decision without reinterpreting or altering in any way the standards the Commission had used in order to come to its interpretation of "managerial."

3) The Superior Court, in a number of cases, supported the Commission's contention that decisions resulting from informal conference are nonappealable.

APPENDIX B

Major Elections

December 12, 13, 14 - Faculty in the State College system voted for representation by Massachusetts Teachers Association. 766 voted for MTA; 516 for American Federation of Teachers/American Association of University Professors; no organization 120.

December 8, 9 - Administrative, clerical, and technical employees at the University of Massachuse-ts, Amherst voted for representation by the University Staff Association/Massachusetts Teachers Asssociation/ National Education Association. The MTA/NEA beat the incumbent Massachusetts State Employees Association by a vote of 372 to 33, with 249 voting for no union.

January 20-February 6- Mail in ballot election by probation and court officers. Local 254 SEIU/AFL-CIO won with 589 votes out of 1151 cast. The election marked the first time that judicial employees were eligible to vote for a collective bargaining representative.

March 31 - Chelsea teachers voted for continued representation by the incumbent Chelsea Teachers Union, Local 1340, AFT, AFL-CIO. AFT won with 162 votes out of 256 ballots cast. The Massachusetts Teachers Association lost the election with 90 votes.

April 5 - Nurses employed by the City of Boston, the Department of Health and Hospitals at Boston City Hospital, the Long Island Chronic Disease Hospital, and the Mattapan Chronic Disease Hospital voted in SEIU, Local 285 over the incumbent Massachusetts Nurses Association. SEIU received 250 votes out of 484 cast.